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INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

MORGAN *v.* GRONOW.

[1870 M. 227.]

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April 18.

Settlement—Power of Appointment—General and Specific Appointments—Invalid Appointment—Remoteness—Confirmation.

Where an appointment is made to take effect out of a trust fund generally, and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment; and the specifically appointed portion is only to be resorted to in the event of a deficiency.

G. having, under his marriage settlement, a power to appoint amongst his children, appointed a portion of the trust fund to his daughter *L.* for life, and after her death as she should by will appoint:—

Held, that the power of appointment by will conferred on the daughter was void for remoteness.

G. also appointed another portion of the trust fund upon such trusts to take effect after the marriage of his daughter *E.* (then unmarried) as she should by deed or will appoint, and in the meantime upon trust for her for life, and after her death as she should by will appoint. *E.*, upon her marriage, purported to appoint the fund to the trustees of her marriage settlement. *G.* afterwards executed a deed poll by which, after reciting the appointments in favour of *L.* and *E.*, and also other appointments, he, in exercise of the power given to him by his marriage settlement, confirmed the several ap-

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pointments appearing by the recitals to have been previously made, and directed and appointed that the trustees of the settlement should hold the trust funds upon the trusts thereinafter mentioned; and he reserved to himself a power to revoke the direction and appointment thereby made, which power of revocation *G.* afterwards exercised. *E.* also afterwards made a second appointment to the trustees of her marriage settlement of the fund:—

Held, first, that the original appointment in favour of *E.* was void for remoteness, and could not be supported as an appointment to *E.* and a re-settlement by her:

Secondly: That the subsequent deed poll operated as a re-appointment of the fund in favour of *E.*:

Thirdly: that the power of revocation extended only to appointments made by way of "direction and appointment" and not to appointments made by way of "confirmation;" and, consequently, that the fund appointed in favour of *E.* passed to the trustees of her marriage settlement under the second appointment executed by her.

THIS was a suit to administer the trusts of a settlement dated the 27th of October, 1821, and made upon the marriage of *Thomas Gronow* and *Mary Ann Lettsom*, whereby a sum of £32,500 £3 10*s.* Bank Annuities was settled upon certain trusts for the benefit of Mr. and Mrs. *Gronow* during their joint lives and the life of the survivor of them, and after the death of the survivor, in trust for the child or children of the marriage or any one or more of such children, in exclusion of the others of them, as Mr. and Mrs. *Gronow* should jointly appoint, and in default of such appointment, as the survivor of Mr. and Mrs. *Gronow* should by deed or will appoint, and in default for the children of the marriage equally, the shares of sons to be vested at twenty-one, and those of daughters at that age or on marriage; and there was the usual hotchpot clause. The settlement contained a power to invest in land; and part of the Bank Annuities was sold and invested under this power in the purchase of two estates, the *Lanharry* estate and the *Ash Hall* estate; and the unsold residue of the Bank Annuities amounted to about £14,000.

The joint power of appointment was not exercised. Mrs. *Gronow* died in 1832, leaving her husband *Thomas Gronow* her surviving. There were seven children of the marriage, the eldest of whom was the Defendant *William Lettsom Gronow*, who had become of unsound mind. Of the others, it is only necessary to name two daughters, *Louisa Lettsom Gronow* and *Elizabeth Lettsom Gronow*.

Subsequently to 1832, *Thomas Gronow* executed divers appoint-

ments under the power in that behalf contained in the settlement. Of these appointments, three only, made by deeds poll dated respectively the 12th of November, 1846, the 5th of December, 1860, and the 20th of March, 1867, need be mentioned for the purposes of this report.

By the deed poll of the 12th of November, 1846, *Thomas Gronow* appointed, first, that after his death the trustees of the settlement should, out of the stocks, funds, securities, and property which might have arisen from the sum of £32,500 Bank Annuities originally comprised in the settlement, and which might then be subject to the trusts thereof, raise such a sum as would be sufficient for the purchase of a Government annuity of £300 during the joint lives of *William Lettsom Gronow* and *Catherine Anne* his wife, and the life of the survivor of them, and should apply the same for the benefit of *William Lettsom Gronow* in manner therein mentioned; and, secondly, that the trustees should, after his death, out of so much of the said stocks, funds, shares, and property as should remain after answering the purposes aforesaid, raise two several sums of £7000; and should as to one of the said sums of £7000 invest the same in manner therein mentioned, and should stand possessed of the investments and the income thereof upon such trusts, to take effect only after the marriage of *Louisa Lettsom Gronow*, as she should, by any deed or deeds executed either before or after her marriage, appoint; and in the meantime, and until any such appointment, and so far as any such, if incomplete, should not extend, should pay the income of such investments to *Louisa Lettsom Gronow* during her life for her separate use without power of anticipation; and after her decease should hold the said investments and the income thereof upon such trusts as she should by will appoint; and should as to the other sum of £7000 invest the same and stand possessed thereof upon the trusts therein mentioned, being trusts for the benefit of *Elizabeth Lettsom Gronow* similar to those thereby declared for the benefit of *Louisa Lettsom Gronow* with respect to the first sum of £7000.

In 1857 *Elizabeth Lettsom Gronow* married *Henry Charrington Fisher*, and on the occasion of such marriage she executed a deed dated the 10th of August, 1857, whereby she purported, in execution of the power conferred on her by the deed poll of the 12th

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of November, 1846, to appoint the sum of £7000 to the trustees of her marriage settlement.

By the deed poll of the 5th of December, 1860, the settlement and divers appointments thereunder were recited; and amongst others the appointment by the deed poll of the 12th of November, 1846, of the two sums of £7000 and £7000, such sums to be for the benefit of the said *Louisa Lettsom Gronow* and *Elizabeth Lettsom Gronow* respectively as therein mentioned." It was also recited that the said *Thomas Gronow* was desirous of confirming in the manner thereinafter mentioned all the appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of the said sum of £32,500 £3 10*s.* per Cent. Bank Annuities originally comprised in the said settlement of the 27th day of October, 1821, or of the property which had arisen therefrom, or of any part or parts thereof respectively, and of appointing in the manner thereinafter mentioned, from and after the decease of the said *Thomas Gronow*, but subject to such prior appointments and dispositions as aforesaid, all the property which had arisen or which might arise from the said sum of £32,500 £3 10*s.* per Cent. Bank Annuities, and which the said *Thomas Gronow* was, by virtue of the said settlement of the 27th day of October, 1821, or howsoever otherwise, empowered to appoint; and it was witnessed that, in furtherance of his said desire, the said *Thomas Gronow*, by virtue and in execution of the power or authority or powers or authorities to him for that purpose given or reserved by the thereinbefore recited settlement of the 27th day of October, 1821, and of all and every other powers or authorities or power or authority in anywise enabling him in that behalf, did thereby confirm the several appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of the said sum of £32,500 £3 10*s.* per Cent. Bank Annuities originally comprised in the said settlement of the 27th day of October, 1821, or of the property which had arisen therefrom, or of any part or parts thereof respectively, and did direct and appoint that from and immediately after the decease of the said *Thomas Gronow* the trustees or trustee for the time being of the settlement of the 27th day of October, 1821, should stand possessed of all the property which had arisen or which might arise from the

said sum of £32,500 £3 10*s.* per Cent. Bank Annuities, subject to all such appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of the said sum of £32,500 £3 10*s.* per Cent. Bank Annuities, or of the produce thereof, or of any part or parts thereof respectively, upon trust that the said trustees or trustee should with or out of the income thereof, or by sale or other disposition from time to time of any portion or portions of the capital thereof, if necessary to make up any deficiency in the income, pay one annuity of £100 sterling to each of the three sons of *Thomas Gronow* therein named during his respective life or until alienation, and subject to the payment of such annuities as aforesaid, that all the said trust premises should remain and be upon trust for *William Lettsom Gronow*, his executors, administrators, and assigns, for his and their own absolute use and benefit: And it was thereby provided that it should be lawful for the said *Thomas Gronow*, at any time or times thereafter, by deed or writing executed as therein mentioned, or by his last will, to revoke, either wholly or in part, the direction and appointment thereby made; and by the same or any other deed or writing so executed as aforesaid, or by any will, to appoint the premises, the trusts of which might be so revoked as aforesaid, unto all or any one or more of the children of *Thomas Gronow* as he the said *Thomas Gronow* might think proper.

By the deed poll dated the 20th of March, 1867, after reciting the deed poll of the 5th of December, 1860, and particularly the power of revocation and new appointment therein contained, and also reciting various other deeds poll (but not that of the 12th of November, 1846), it was witnessed that *Thomas Gronow*, by virtue and in execution of the power reserved to him by the settlement of the 27th of October, 1821, and the deed poll of the 5th of December, 1860, and of every other power in anywise enabling him in that behalf, did thereby wholly revoke the direction and appointment made by the deed poll of the 5th of December, 1860, of the property which had arisen from the £32,500 £3 10*s.* Bank Annuities, and did thereby direct and appoint that from and after his decease the trustees of the settlement of the 27th of October, 1821, should stand possessed of the *Lanharry* estate upon trust, out of the annual produce, or by sale or mortgage, thereof, to raise

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the sum of £1000, and also two annuities of £150 for the benefit of the children of *Thomas Gronow*, as therein mentioned; and subject thereto in trust for *William Lettsom Gronow* in fee; and he thereby further directed and appointed that from and after his decease the *Ash Hall* estate should be held upon trust for *William Lettsom Gronow* in fee.

Louisa Lettsom Gronow died on the 23rd of January, 1868, without having been married. By her will she appointed the £7000 first mentioned in the deed poll of the 12th of November, 1846, to her sister *Elizabeth Lettsom Fisher* for her separate use.

Thomas Gronow died on the 17th of August, 1870.

By a deed poll dated the 21st of October, 1870, Mrs. *Fisher*, in execution of the power reserved to her by the deed poll of the 5th of December, 1860, and in confirmation of the deed of the 10th of August, 1857, appointed the second sum of £7000, in the deed poll of the 12th of November, 1846, mentioned, to the trustees of her marriage settlement.

The cause now came on for further consideration. It appeared that a considerable portion of the trust funds was unappointed, and that such unappointed portion would be sufficient to purchase the annuity of £300, and one (but not both) of the sums of £7000 mentioned in the deed poll of the 12th of November, 1846. The questions, under these circumstances, were, 1. whether either of the sums of £7000 and £7000 was validly appointed; 2. whether the fund directed to be raised to purchase the annuity of £300, and the sums of £7000 and £7000, or either of them (if validly appointed), were to be raised exclusively out of the unappointed portion of the trust fund, or out of such portion rateably with the *Lanharry* and *Ash Hall* estates specifically appointed to *William Lettsom Gronow*.

Mr. *Haynes* (Mr. *Kenyon*, Q.C., with him), for the Plaintiffs, the trustees of the settlement of 1821, stated the questions to the Court.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for *William Lettsom Gronow*:—

Where there is a series of appointments, they must, as a general rule, be held to take effect in order of date; and in point of form it

must be admitted that the annuity fund and the two sums of £7000 and £7000 directed to be raised by the earliest appointment, that of the 12th of November, 1846, are charged on the whole trust fund. We say, however, that it was still competent for the donee of the power to appoint specific portions of the trust funds, subject, of course, to the prior appointment. The donee of the power has done so, and has said in effect that, as between the parties taking in default of appointment and under a general appointment which can be satisfied without disturbing specific appointments, those specific appointments must take effect. We say, therefore, that the annuity fund and the sums of £7000 and £7000 (if validly appointed) must be raised out of the unappointed portion of the fund as far as that will extend, and that the *Lanharry* and *Ash Hall* estates are not to be resorted to until the unappointed portion of the fund is exhausted.

But, in fact, the appointment of £7000 to *Louisa Lettsom Gronow* is invalid so far as it purports to confer on her a power to appoint by will, for any appointment thereunder would be bad for remoteness: *Wollaston* v. *King* (1). We say, also, that the appointment to Mrs. *Fisher*, in so far as it extends beyond her life interest, is bad also. The deed of the 12th of November, 1846, it is true, purports to confer on her a general power of appointment, but it is only to take effect after her marriage: that is also void for remoteness, for Mrs. *Fisher's* marriage need not necessarily have taken place within a life or lives in being and twenty-one years, reckoned from the 27th of October, 1821, the date of the settlement creating the power which *Thomas Gronow* purported to exercise.

[They referred to *Slark* v. *Dakyns* (2); *Hodson* v. *Ball* (3); *Lett* v. *Randall* (4); *In re Cunynghame's Settlement* (5); *In re Teague's Settlement* (6); *Fry* v. *Capper* (7).]

Mr. *Southgate*, Q.C., and Mr. *Marten*, and Mr. *Fischer*, Q.C., and Mr. *Maclaren*, for other parties whose interest it was to make the unappointed fund as large as possible, adopted the same line of argument.

(1) Law Rep. 8 Eq. 165.
(2) Ibid. 15 Eq. 307.
(3) 14 Sim. 558.
(4) 3 Sm. & Giff. 83.
(5) Law Rep. 11 Eq. 324.
(6) Ibid. 10 Eq. 564.
(7) Kay, 163.

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Mr. *Fry*, Q.C., and Mr. *Everitt*, for Mrs. *Fisher*:—

The appointment by the deed poll of November, 1846, in favour of Mrs. *Fisher* is valid. If Mrs. *Fisher* had been a party to that deed, it would have operated as an appointment to her, and then a re-settlement by her of the fund: *White* v. *St. Barbe* (1); *Langston* v. *Blackmore* (2); *Sugden* on Powers (3); and by subsequently appointing the fund on the occasion of her marriage, she assented to the deed of the 12th of November, 1846, and it will thus operate in equity in the same manner.

But if this be not so, then we say that the deed of the 5th of December, 1860, operates as a fresh appointment of the fund: *Carver* v. *Richards* (4); and as Mrs. *Fisher* was then married, the general power of appointment to take effect on and after her marriage would not be too remote, and has been effectually exercised by the deed poll of the 21st of October, 1870. The deed of the 5th of December, 1860, no doubt, reserves a power of revocation which has since been exercised. That power, however, only extends to the "direction and appointment" made by the deed poll of the 5th of December, 1860, not to the prior appointments which are thereby treated as "confirmed."

We do not contend that the appointment in favour of *Louisa Lettsom Gronow* was valid.

Mr. *Southgate*, in reply:—

Thomas Gronow, by the deed of the 5th of December, 1860, only confirmed the prior appointment—that is to say, he said that all deeds previously executed were to be left as they then stood, but he did not confer on them any greater validity than they had before. It is plain from the recital that he intended to deal with the appointments in favour of *Louisa Lettsom Gronow* and *Elizabeth Lettsom Gronow* in precisely the same way; yet it is now contended that the appointment in favour of one is valid, while the other is admitted to be invalid.

If, however, it is said that a confirmation of the appointments was equivalent to making a new appointment, then the power of revocation must extend to all such new appointments; that power

(1) 1 V. & B. 399.
(2) Amb. 289.
(3) 8th Ed. 670.
(4) 1 D. F. & J. 548.

of revocation has been exercised; therefore, *quâcunque viâ*, the appointment in favour of Mrs. *Fisher* fails.

Mr. *Roxburgh*, Q.C., Mr. *W. R. Fisher*, and Mr. *Mounsey Heysham*, for other parties.

LORD SELBORNE, L.C.:—

With regard to some of the points in this case, I do not think there is any difficulty at all. In the first place, with regard to the sum to be laid out in the purchase of a Government annuity for the lunatic, I think it is quite clear that the direction that that money shall be provided out of the funds and property which at the death of the tenant for life shall be subject to the trusts, is not to be read or understood as a direction that it should be taken out of any part of those funds and property that might have been validly appointed to other persons, in derogation of those appointments to other persons; unless, indeed, there had been a deficient fund, in which case this first appointment would have had priority. I am, therefore, of opinion that the appointment of the two estates called *Lanharry* and *Ash Hall*, made by a later deed to the lunatic, takes effect; and that, if there are adequate funds to answer the appointment of the 12th of November, 1846, without interfering with those estates, the lunatic takes those estates entirely discharged of any claim in respect of the money necessary to buy the Government annuity, or of the two sums of £7000, or either of them. It would be different, of course, if there were a deficiency, and in that case the deficiency must be raised out of those estates.

The next question is as to the interest of *Louisa*, with respect to whom the matter stands simply in this way—that no interest in any part of the capital of £7000 beyond the mere life interest is given to her, except by virtue of a power to appoint the capital of that sum by will contained in the deed of the 12th of November, 1846. If she had been living at the date of the instrument creating the power, I should have thought that was within the terms of the power. She was not, however, then living; and, inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time

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which might be beyond the limits allowed by the rule as to perpetuities, not only *Wollaston* v. *King* (1), but principle, obliges me to hold, however reluctantly, that that is void. It is the same thing as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time. If there had been a gift in the deed to her when she attained the age of twenty-five, to vest then and not earlier, it would have been too remote; *à fortiori*, such a gift as this, depending upon the exercise of the power, must be too remote also.

With regard to the £7000 given to *Elizabeth*, if the matter had rested upon the original deed I should have been of the same opinion, because marriage in the case of an unmarried and unborn child is an event as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being, as death is; and the case is not one in which there is any gift of the absolute interest in the capital to her independently of the exercise of the power, or of the other power to be exercised by will only. Nothing is given independently of those powers and the exercise of them except a life interest.

I cannot accede to the view that the cases, of which *White* v. *St. Barbe* (2) and *Langston* v. *Blackmore* (3) are examples, in the least degree touch such an instrument as this. *Langston* v. *Blackmore*, which is one of the strongest cases in its circumstances, was, after all, only an example of exactly the same principle as *White* v. *St. Barbe;* that is to say, that when there is an instrument which is made with the concurrence of the object of the power to whom the whole might be validly appointed (which was the case in *Langston* v. *Blackmore*), if the instrument goes on to settle the fund, as there, in strict settlement upon the object of the power for life, with remainder to such wife as that object of the power should marry, remainder to the children of that object of the power, and, for want of such children, over to other persons, so as to make it a strict settlement, out and out, which would be absolutely operative, and leave nothing to be done if they were all objects of the power, it shall be held to be in substance, if the facts warrant it, the object of the power concurring,

(1) Law Rep. 8 Eq. 165. (2) 1 V. & B. 399. (3) Amb. 289.

an appointment absolutely to the object of the power and a settlement by him on those particular limitations. Here there is no appointment to the object of the power of the capital at all, unless it is to be got at through the medium of these powers of appointment; nor is there any settlement, except by the same exercise of those future powers of appointment, upon any one whatever. The whole thing remains in abeyance, and can vest in nobody till those powers are exercised, the one of which is dependent, not upon the mere will of the person to whom it is given, but upon the future uncertain event of marriage, uncertain as to the fact and uncertain as to the time, and the other upon the equally uncertain event, as to time, of death.

At first my impression was that nothing was shewn to have taken place afterwards which would mend the case in favour of *Elizabeth;* but more careful attention to the particular terms of the subsequent document has altered that impression, and I now think, although the original appointment was bad, except as to the life estate, as far as *Elizabeth* was concerned, that the subsequent deed of the 5th of December, 1860, followed up, I think, ten years afterwards by the deed of the 21st of October, 1870, have had the effect of validly vesting that £7000 in the trustees of that deed of the 21st of October, 1870. If the deed of 1860 had been, as was my first impression, simply a deed which expressed an intention to confirm a number of previous instruments as they stood, and only to exercise the power of appointment originally given to or then vested in Mr. *Thomas Gronow*, for some other purpose, then I should have felt great difficulty in holding that the confirmation was anything more than the statement of a desire and an intention not to interfere with the operation of the previous instruments as they were. I do not decide that. Probably I might have taken some time to look into any cases in which the language of confirmation *simpliciter* was used before I actually delivered a decision to that effect. That certainly was the impression on my mind during the progress of the argument, but I find that this deed goes much beyond that. It not merely expresses a desire of confirming in the manner thereinafter mentioned all the previous appointments and dispositions, but it proceeds to do that by way of appointment. [His Lordship read part of the deed.] Therefore, on the face of the deed, at least as strongly as in the

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case of *Carver* v. *Richards* (1), an intention to do this by an execution of the power appears; and surely if there were anything in the nature of confirmation or setting up of any of those previous appointments, which needed a further execution of the power, when I find an intention to confirm, coupled with the express declaration that he does that by virtue and in execution of the power, I am bound to give every effect to it which a new execution of the power for that purpose would give.

Then the question which arises is, if he had as on that day executed, for the first time—of course as far as phraseology is concerned one cannot conceive that that would have happened, but looking to the substance of it, it might have happened—if he had then, for the first time, made such an appointment as that contained in the deed poll of the 12th of November, 1846, so far as relates to the £7000 given in favour of *Elizabeth*, I apprehend it would have clearly been discharged from the vice of remoteness, because, although there is phraseology in it which has the aspect of application to a person unmarried at the time, yet in point of fact she was married at the time, and therefore there could have been no contingency or uncertainty; and the event on which the power was to arise had happened, and had happened in the lifetime of the person who was the first tenant for life under the original settlement. It appears to me, on principle as well as on the authority of *Carver* v. *Richards*, that that is, in fact, the operation of this deed of 1860. That would not, I apprehend, of itself have been enough to set up, as operative in law, the intermediate marriage settlement which had been executed upon the marriage of *Elizabeth*, though as between her and her husband probably there would have been an equity by which she would have been bound to execute, in favour of the persons taking under that instrument, the power so given to her, which was not a limited power, but a general one, which she might have executed in favour of herself; and, therefore, on the principle of *White* v. *St. Barbe* (2), she could clearly execute it in favour of other persons. That prior appointment, by itself, could not have been set up; but the deed of the 21st of October, 1870, seems to have been amply sufficient for the purpose of doing that which was, no doubt, in accordance with her moral, and probably her legal

(1) 1 D. F. & J. 548. (2) 1 V. & B 399.

and equitable, obligations; so that, unless the exercise of the power of revocation comes in to destroy her title, I hold that she is well entitled, and that her trustees take the £7000. I confess this seems to me to be the nicest point of the case; and although I have come to the conclusion that the power of revocation did not extend to this matter, and has not been exercised as to it, yet I do not dissemble from myself that there is some difficulty about that point. My reason for thinking that the power does not extend to it is this:—Although I hold that the words of confirmation were intended to operate, and did operate, in substance by way of re-appointment, yet still, in considering the question of revocation, one must attend to the language and the phraseology of the deed. Now the deed, so far as language and phraseology are concerned, distinguishes between the two operations, the one of which is called, upon the face of it, confirmation, and the other is called direction and appointment. The words are these:—[His Lordship read them.] As a matter of construction, I think he intends, in the power of revocation, to refer to what had been done in terms, by way of direction and appointment, and not to that which had been done in terms by way of confirmation; and, therefore, that he did not reserve a power of revocation as to that which he had confirmed; and, of course, therefore, exercising it afterwards, he only exercised it according to the reservation itself, and he does so, still using the same words as to direction and appointment.

I am fortified in that view by this consideration, though I do not say it is conclusive, that I can hardly suppose the testator to have been ignorant, when he executed this deed, that his daughter *Elizabeth* had married, and had for valuable consideration settled, so far as she could settle, this £7000 upon her husband and the issue of the marriage. It would have been unreasonable and contrary to all moral equity for the testator, confirming under those circumstances the power so acted on by his daughter, to have desired to reserve, or to have exercised, a subsequent power of revocation. My conclusion, therefore, is, that that gift of £7000 in favour of *Elizabeth* must prevail.

Solicitors: Messrs. *Lewin & Co.*; Messrs. *James, Curtis, & James*; Mr. *D. W. Pearse.*

L. C. for M. R.
1873
May 7, 8.

WILKINSON *v.* JOBERNS.

[1872 W. 124.]

Partition Suit—Sale—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 4.

The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under sect. 4 of the *Partition Act*, 1868.

THIS was a suit instituted for the purpose of obtaining a decree for sale under the *Partition Act*, 1868, of a freehold estate situate at *Aldridge*, in *Staffordshire*. The Plaintiffs, as trustees for sale under the will of *John Arrowsmith*, deceased, were the owners of one moiety of the estate; the Defendant *Joberns* was the owner of the equity of redemption of the other moiety, which was subject to mortgages created by him.

The estate was about fifty acres in extent; and twenty-one cottages and a wharf had been erected on divers parts thereof. One of these cottages, with the garden and outbuildings, had for many years been in the occupation of the Defendant *Joberns*, as his dwelling-house, at a yearly rent of £25. The whole of the residue was, previous to the death of *Thomas Arrowsmith* (a son of the said *John Arrowsmith*) in December, 1871, in the occupation of the firm of *Joberns & Arrowsmith* (consisting of the Defendant *Joberns* and *Thomas Arrowsmith*) under a yearly tenancy; and since *Thomas Arrowsmith's* death it had been occupied by the Defendant *Joberns* as surviving partner under a like tenancy; and it constituted an entire brickmaking establishment, in which the Defendant *Joberns* and his late firm carried on the business of brick and tile makers.

Under the surface were coal mines of some value, but it was admitted that these were not of sufficient extent to be worked profitably by themselves. As regarded the surface, it was alleged by the Plaintiff that it could not be advantageously partitioned; but could only be sold to advantage as one brickmaking concern. This, however, was denied by the Defendant, who alleged that if

the property were divided into two parts, both would be of ample size, and quite sufficient in all respects for carrying on two distinct businesses.

The Defendant *Joberns* by his answer stated that he had expended more than £200 in improving his dwelling-house; that he purchased his moiety of the property solely with the intention of occupying the same in connection with his business as a brick-maker, which he had carried on in the neighbourhood for the greater part of his life; that the effect of a sale would probably be to drive him away from the neighbourhood, and compel him to go where he was not known, and had no business connection; and he submitted that under these circumstances a partition and not a sale ought to be decreed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Bagshawe*, for the Plaintiffs:—

Under sect. 4 of the *Partition Act*, 1868, the Plaintiffs, as owners of one moiety of the property, are entitled to a decree for sale, unless good reason is shewn to the contrary. The burden of proof lies on the party resisting a sale: *Pemberton* v. *Barnes* (1); and the Defendant *Joberns* has shewn no sufficient reason why the property ought not to be sold.

Sir *R. Baggallay*, Q.C., and Mr. *C. Browne*, for the Defendant *Joberns*:—

We admit that the burden of proof lies with us, and we submit that the fact that the owner of one moiety resides on part of the property and occupies the rest for business purposes is sufficient reason for decreeing a partition instead of a sale. In *Pemberton* v. *Barnes* none of the parties had ever resided on the property.

Mr. *Southgate*, Q.C., for the mortgagees.

LORD SELBORNE, L.C.:—

I think the Plaintiffs are entitled to what they ask. The Act of Parliament clearly throws the burden of proof upon the tenant in common who resists sale and claims partition, and the sole

(1) Law Rep. 6 Ch. 685.

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question is, whether he has discharged himself of it by shewing special circumstances in the particular case which would make it wrong to direct the sale. Now really the only circumstance which has been mentioned, and which has been very properly relied upon and pressed, is this, that the Defendant Mr. *Joberns* is in occupation of the property. Then it is quite necessary, in order to see whether under the Act of Parliament that occupation has a legitimate bearing upon the question I have to decide, to consider the character and the nature of that occupation. If he is really an occupying tenant from year to year, by virtue of a contract having nothing at all to do with his position as tenant in common of the fee of the land, it is not obvious why that should be a reason any more than the occupation of anybody else under like circumstances. His rights as an occupying tenant from year to year depend upon the law applicable to such a tenancy; they will be neither interfered with by any order which may be made for sale, nor by any order which might be made for partition; he must have notice to quit, I suppose, unless there was some arrangement to the contrary, in either case exactly as any other tenant would have. Therefore I cannot see that the circumstance of his having chosen to enter into a contract, making himself tenant from year to year under the freeholders of this property, ought to exercise any material influence upon the decision of the question under the statute.

When I come to consider the nature of the property, it strikes me strongly that if ever one could imagine property of a nature and character making it reasonable to apply the Act of Parliament in the manner now asked, this property is of such a nature and of such a character. It manifestly is not residential property; it is not property which bears to the owners of it a specific value or a fancy value unconnected with its commercial value, but it is in the very strictest sense a commercial property, having commercial value as to the surface by reason of its being a considerable brickfield, and as such used, and occupied, and enjoyed; having commercial value as to the subjacent strata by reason of their containing valuable minerals in considerable quantities. It has really been occupied by Mr. *Joberns* solely for commercial purposes, and that not by him as an individual but as a partner, I understand, of the son of

the late Mr. *Arrowsmith*. It therefore has been occupied for partnership commercial purposes. If any other persons had occupied in those circumstances, their interests as occupiers could not possibly have been set up as against the right of a tenant in common to have a sale; and I cannot see why the circumstance of one of the partners in a commercial partnership being also a tenant in common ought to affect the interests of the other tenant in common, who thinks that this commercial property will be best realized and the value of his share in it best secured by its being sold together as one entire estate. As far as I can judge from the evidence, the strong inclination of my opinion is, looking to those circumstances which I have mentioned, and to the quantity of land, and to the great probability even, from the absence of detailed evidence, that various persons might be inclined to bid for it—I should say that the preponderating probability is that it would be sold to a much greater advantage as an entire estate than otherwise. Of course if, under an order for sale, it should appear to be beneficial to divide it into lots, that can be done, and it by no means follows that those lots would be the same with the lots into which it would be divided for the purpose of partition, which ought to be as nearly as possible equal. Here we have cottages for workmen on one part of the estate, wharves upon other parts, and brickfields open, and so on. It is quite possible, that by some division very different from what would be necessary for equality of partition, it may be subdivided to advantage. I express no opinion about that. If it should be so, then, of course, the Defendant would be able to bid for such lots as might be of particular value to him; and he can bid for the whole if it is not divided into lots, and he will have a fair chance with all others. But if the effect of refusing a sale would practically be to diminish the value of the Plaintiff's interest, that seems to me to be the effect precisely which the Act was intended to avoid, and, as I have already said, I can imagine no description of real property to which the policy of that Act would be more properly applicable than this, of which the value is essentially commercial. I think, therefore, it is right to make the decree which is asked. As to the costs, looking at all the circumstances of the case, I am disposed, in the exercise of my discretion under the Act, to say that there shall be no costs up to and

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including the hearing. The mortgagees will add their costs to their security.

Sir *R. Baggallay* asked that the Defendant *Joberns* might be at liberty to bid, and, in the event of his becoming purchaser, might pay into Court one moiety only of the purchase-money.

LORD SELBORNE, L.C.:—I think what you ask is very reasonable.

Solicitors: Messrs. *Pearce & Son*, agents for Messrs. *Wilkinson & Gillespie, Walsall;* Messrs. *Young, Maples, & Co.*, agents for Messrs. *Marlow & Potter, Walsall.*

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HERMANN *v.* HODGES.

[1872 H. 274.]

Agreement to execute Mortgage—Specific Performance.

The Court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale.

23 Ch D 142

THIS was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the Plaintiff to the Defendant) to execute a mortgage "with an immediate power of sale."

Mr. *Townsend*, for the Plaintiff, asked for a decree according to the form given in *Seton* on Decrees (1). He referred to *Ashton* v. *Corrigan* (2), in which a doubt was expressed by Vice-Chancellor *Wickens* whether the agreement was one of which the Court would decree specific performance.

Mr. *Northmore Lawrence*, for the Defendant, did not oppose.

LORD SELBORNE, L.C., said that he had no doubt of the propriety of making the decree asked for, unless the Defendant was prepared to pay off the advance at once.

Solicitors: Mr. *C. J. Orton;* Messrs. *Poole & Hughes.*

(1) Vol. i. p. 443. (2) Law Rep. 13 Eq. 76.

FARRER *v.* ST. CATHARINE'S COLLEGE, CAMBRIDGE.

L. C. for M. R.
1873
April 21.

[1872 F. 33.]

Will—Codicil—Revocation—Inaccurate Recital of Will—Gift of Legacy "in addition" to Legacy inaccurately stated to be given—Falsa Demonstratio—Extrinsic Evidence—Payment of Legacy Duty—Insufficient Personal Estate—Abatement.

A codicil revoking a will does not necessarily revoke a prior codicil.

A testator made a will and two codicils, by none of which he gave anything to *St. Catharine's College*, and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his said will he had bequeathed £1000 to *St. Catharine's College*, he confirmed the said bequest, but in all other respects he revoked his said will; and he gave to *St. Catharine's College* (in addition to the bequest of £1000) a sum of £5000, and appointed executors of his said will and codicil:—

Held, that the last codicil revoked the will of the testator, but not the codicils of prior date:

Held, also, that under the last codicil *St. Catharine's College* was entitled to a legacy of £6000 in the whole.

A testator by his will gave legacies of £25 each to the Rev. *J. B.*, the Rev. *N. L.*, and the Rev. *J. D. C. W.*, described as curates of a particular church. At the date of the will and the death of the testator, the Rev. *J. B.*, the Rev. *N. L.*, and the Rev. *W. C. B.* were curates of the church: there never had been any curate of that church named *W.*, but there was a clergyman of that name whose initials were *J. D. C.*:—

Held, that the Rev. *J. D. C. W.* was entitled to the legacy, and that extrinsic evidence of the testator's intention was inadmissible.

A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, and in the case of a deficiency of assets must abate along with other pecuniary legacies.

EDMUND YORKE, a Fellow of *St. Catharine's College, Cambridge*, made his will, dated the 31st of March, 1846, and thereby gave a sum of £10,000 £3 5*s.* Reduced Annuities to trustees upon trusts for the benefit of his brother and sister during their joint lives and the life of the survivor, and after the death of the survivor he gave £2500, part of the said stock, to the Lord Mayor and Charitable Trustees of the city of *York*, for the purposes therein mentioned; and he gave £2500, further part of the same stock, to the Mayor, Vicar, and Charitable Trustees of *Leeds*, for the purposes therein mentioned; but he made no bequest to or in favour of *St. Catharine's College*.

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The testator made a first codicil (dated the 15th of May, 1847) to his will, and thereby gave the sum of £800 consols, or whatever sum in that stock might be standing in his name at the *Bank of England*, to the Masters of *Trinity College* and *Magdalen College, Cambridge*, to found two prizes, to be awarded to the authors of the best essays upon the consistency or inconsistency of the law of primogeniture with the dictates of nature as well as the spirit and precepts of the Christian religion, regard being had to the Scriptures applicable to the subject.

The testator made a second codicil (dated the 17th of May, 1847) to his will, whereby, after reciting the dispositions by his will made of the sums of £2500 and £2500, part of the sum of £10,000 £3 5*s.* Annuities, to the Lord Mayor and Charitable Trustees of *York*, and the Mayor, Vicar, and Charitable Trustees of *Leeds*, he bequeathed two further sums of £1500, further parts of the same annuities, to the same persons respectively, for the same purposes respectively as by his will declared with reference to the sum of £2500.

The testator made a third codicil (dated the 29th of November, 1871) to his will. This codicil commenced as follows:—"This is a codicil to the last will of me *Edmund Yorke*, Fellow of *St. Catharine's College, Cambridge*, and now residing at 2, *Alexander Square, Brompton*. Whereas by my said will I have bequeathed £1000 to be employed by or for the benefit or other the purposes of *St. Catharine's College;* Now I hereby confirm the said bequest, but in all other respects I revoke my said will; and I give to the Master and Fellows of *St. Catharine's College* for the time being (in addition to the above-mentioned bequest of £1000) the sum of £5000." The testator then proceeded to give numerous pecuniary legacies, including a legacy to the Rev. *Thos. Fraser Storks*, the vicar of *Holy Trinity Church, Brompton*, and legacies of £25 each to "the Rev. *John Bliss* and the Rev. *Nathaniel Liberty*, and the Rev. *J. D. C. Wickham*, curates of the said church;" and he declared that all the legacies given by him were given free of duty. He appointed *William James Farrer* and *Frederick Willis Farrer* "executors of my said will and codicil;" and he bequeathed his residuary estate to *St. Catharine's College*.

The testator also executed a fourth codicil, which is immaterial

for the purposes of this report: and he died on the 29th of November, 1871. Probate was granted of the will and four codicils, and this suit was instituted by the executors for the administration of the estate, and the usual administration decree was made accordingly.

The Chief Clerk by his certificate found as to the legacies of £25 each given to the curates of *Holy Trinity Church, Brompton*, that there was not at the time of the testator's death, and there never had been, a curate of such church of the name of *Wickham* —that there were three curates at the time of the testator's death, viz., the Rev. *John Bliss*, the Rev. *Nathaniel Liberty*, and the Rev. *William Conybeare Bruce;* and that at the date of the codicil giving the legacy and of the certificate there was a clergyman named *Wickham*, the initials of whose Christian names were *J. D. C.*

The cause now came on to be heard on further consideration; and the questions were, first, whether the will was revoked by the third codicil; secondly, whether the first and second codicils were so revoked; thirdly, whether, inasmuch as the estate was alleged to be insufficient for payment of the pecuniary legacies in full, *St. Catharine's College* was entitled to the legacy of £1000 stated in the codicil to have been bequeathed by the will; fourthly, who was entitled to the legacy of £25 bequeathed to the Rev. *J. D. C. Wickham*.

The Rev. Mr. *Wickham* and the Rev. Mr. *Bruce* had both been communicated with, but neither made any claim to the legacy.

Mr. *Fischer*, Q.C., and Mr. *Vaughan Hawkins*, for the executors, proposed to read the instructions given by the testator for the third codicil, with the view of shewing that the testator intended to give the legacies of £25 each to the three curates of *Holy Trinity Church, Brompton;* or, at all events, that the testator had no knowledge of the Rev. *J. D. C. Wickham*; and they cited *Bernasconi* v. *Atkinson* (1); *Gillett* v. *Gane* (2).

LORD SELBORNE, L.C.:—The case of *Drake* v. *Drake* (3) shews that the evidence cannot be read; if there had been two persons

(1) 10 Hare, 345. (2) Law Rep. 10 Eq. 29.
(3) 8 H. L. C. 172.

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of the name of *J. D. C. Wickham* it might have been admissible, but here there is only one. It is true he does not answer the description of curate of *Holy Trinity Church, Brompton*, but that is merely *falsa demonstratio*. You cannot change this into a bequest to each of the curates of that church: there might have been ten curates. It seems to be quite clear that Mr. *Bruce* cannot be entitled to the legacy, and that Mr. *Wickham* must have it.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the Mayor and Charitable Trustees of *York*; and

Mr. *Charles Hall*, for the Mayor, Vicar, and Charitable Trustees of *Leeds*:—

The will which the third codicil purports to revoke cannot be the will of the 31st of March, 1846, for that will does not answer the description given by the codicil; it contains no bequest of any description in favour of *St. Catharine's College*. It is just as if the testator had purported to revoke a will of a particular date, and he had made no will bearing that date.

At all events, the first and second codicils are not revoked: *Bunny* v. *Bunny* (1); *Pratt* v. *Pratt* (2); *Jarman* on Wills (3).

Sir *R. Baggallay*, Q.C., and Mr. *J. T. Humphry*, for *St. Catharine's College*:—

The third codicil revokes the will of the 31st of March, 1846, and the two previous codicils. The testator speaks of his last will; and the probate is conclusive evidence that the will of the 31st of March, 1846, is his last will. Again the testator revokes his will; and by that term he must be taken to mean the aggregate of documents at that time constituting his testamentary disposition: *Crosbie* v. *Macdouall* (4); *Gordon* v. *Lord Reay* (5); *Aaron* v. *Aaron* (6); *Jarman* on Wills (7).

At all events, we are clearly entitled to the legacy of £1000 mentioned in the codicil as having been given by the will.

(1) 3 Beav. 109.
(2) 14 Sim. 129.
(3) 3rd Ed. vol. i. p. 169.
(4) 4 Ves. 610.
(5) 5 Sim. 274.
(6) 3 De G. & Sm. 475.
(7) 3rd Ed. vol. i. p. 175.

LORD SELBORNE, L.C.:—

These are, no doubt, perplexing instruments. I conclude, first of all, that there is no revocation of anything but the first instrument, which I must take to be the last will intended by this codicil, because it has been admitted to probate with two intervening codicils. It purports, upon the face of it, to be the last will, and upon the face of each of these codicils it is referred to as being so, and no other instrument at all appears.

I think the cases of *Bunny* v. *Bunny* (1) and *Pratt* v. *Pratt* (2) are sufficient authorities to shew that where a testator begins by distinguishing between his last will and a codicil to it, and purports to revoke his last will only, not referring to any previous codicil that the revocation is not to be carried further than the necessity of the terms which he has used may require, and it is in accordance with the well-known principle of the case of *Doe* v. *Hicks* (3), that a clear gift is not to be revoked, except by clear words. I hold, therefore, although it is perfectly true, as Mr. *Humphry* says, that the word "will," used abstractedly from the context, carries all testamentary instruments which together make the will of the testator, yet here, where you have the context which expressly distinguishes the last will from the codicil, you are not to infer that all previous codicils are revoked because he revokes the last will: and still less to do so when reference is made to the will, apparently as a particular instrument, and that is an inaccurate reference. I therefore hold that the first instrument is revoked, and that *in toto*, because there is no such gift as that of £1000, supposed to be confirmed; but that the intervening codicils are not revoked.

Then we have to consider what is the effect of the intervening codicils; and, in the first place, there is that first codicil with the very curious gift for the foundation of two annual prizes. It cannot be the gift referred to in the third codicil, because it differs in every particular; it is £800, and not £1000; it is not given either for the benefit of *St. Catharine's College*, which the £1000 is supposed to have been, nor for any purposes of *St. Catharine's College;* it is not even given to *St. Catharine's College* as a trustee or one of the trustees; it is a very singular gift to found two prizes for essays

(1) 3 Beav. 109. (2) 14 Sim. 129.
(3) 8 Bing. 475.

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upon the law of primogeniture, and this in a limited point of view as connected with the text of Scripture. One cannot help thinking it is a strong example of the inconvenience of the state of the law which forces upon the public gifts of very doubtful public utility. However, such is the state of the law, and I am obliged to hold that, as the codicil in my opinion was not revoked, this is a good charitable bequest.

Then we come to the second codicil, which recites the gift in the will in favour of the *York* and *Leeds* charities, and adds to each of those two gifts £1500. Had there been no subsequent codicil that would have been a clear gift of £4000 in the whole to each of those charities. I do not apprehend that that codicil gave any additional force to the original gifts of £2500 and £2500, except that it did not revoke them; it simply added something to those gifts. When the testator by the third codicil revoked the last will, with the exception which does not save those particular gifts, I must hold that he revoked the original gifts of £2500 each, but that he left the £1500—in other words, that he reduced the bounty given to them from £4000 to £1500.

Then we come to the question as to *St. Catharine's College*. If it be necessary to decide the point, I am of opinion, upon the authority of *Jordan* v. *Fortescue* (1), and upon principle, that the testator has in this instrument sufficiently manifested an intention that *St. Catharine's College* shall take for its own benefit a legacy of £6000 in the whole; therefore there is a good gift of £6000 in the whole by this codicil to *St. Catharine's College*.

Then, with respect to the gift to the three clergymen, I have already said that, there being a gift of £25 to the Rev. *J. D. C. Wickham*, described as curate of a particular church, and there being such a clergyman as the Rev. *J. D. C. Wickham*, although he has never been curate of that church, I hold that the Rev. *J. D. C. Wickham* is entitled to this £25.

June 21. This case was spoken to on the minutes of decree. It appeared that the general personal estate of the testator was insufficient for payment of the pecuniary legacies in full, and the

(1) 10 Beav. 259.

question was raised as to whether any legacy duty was payable out of that estate on the specific legacies.

Sir *R. Baggallay*, Q.C., for *St. Catharine's College*, contended that payment of legacy duty must be postponed until payment of the pecuniary legacies in full; or at all events that the gift of legacy duty must be treated as a pecuniary legacy, and abate accordingly: *Wilkinson* v. *Barber* (1).

Mr. *Southgate*, Q.C., for the Mayor and Charitable Trustees of *York*, submitted that the legacy duty on the £1500, part of £10,000 £3 5*s*. Reduced Annuities, to which his clients had been held entitled, ought to be paid out of the Reduced Annuities: *Noel* v. *Lord Henley* (2).

LORD SELBORNE, L.C., said that a gift of legacy duty on a specific or pecuniary legacy was a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other; and in the event of the general estate being insufficient the gifts of legacy duty must abate along with other pecuniary legacies. The value of the specific legacies must, therefore, be ascertained, and the amounts of legacy duty payable thereon calculated; and such amounts must be treated as pecuniary legacies, and abate accordingly.

Solicitors: Messrs. *Farrer, Ouvry, & Co*; Messrs. *Emmet & Son*; Mr. *R. Metcalfe*.

(1) Law Rep. 14 Eq. 96.

(2) 7 Price, 241.

V.-C. M.
1873
March 8.

TALBOT *v.* EARL OF SHREWSBURY.

[1868 T. 88.]

Rent—Award under Arbitration—Specialty not Simple Contract Debt.

9 Ch D 611

In 1862 *A.* agreed to lease a mine to *B.* Disputes arose between the parties, and *A.* brought an action against *B.* under the agreement, and *B.* filed a bill against *A.* to have the agreement set aside. The parties then referred all the matters in dispute between them to arbitration, and the arbitrator awarded that the agreement for a lease was valid; that it should be cancelled, and that *B.* should pay to *A.* the sum of £5513. *B.* died, and a suit was instituted to administer his estate, under which *A.* carried in a claim to rank as a specialty creditor in respect of the sum awarded:—

Held, that the sum was awarded by way of damages and not for rent, and therefore was not entitled to rank as a specialty debt.

THIS was a suit to administer the estate of the late Earl of *Shrewsbury*. A claim had been carried in under the administration by Mrs. *Matty Jones* for a sum of £5515, and a question was now raised whether that sum was to be considered as a specialty or a simple contract debt. On the 8th of March, 1862, the late Earl had entered into an agreement in writing, but not under seal, with Mrs. *Jones* for a lease from her for fifty-eight years of certain minerals under a farm at *Llantrissant*, at a rent of £1000 per annum.

Disputes arose between the parties on the subject of the lease, and an action was brought by Mrs. *Jones* under the agreement for rent and damages; and a bill in equity was filed against Mrs. *Jones* to have the agreement set aside. It was then agreed between the parties that all matters in dispute relating to the agreement of the 8th of March, 1862, should be referred to arbitration; and in the month of February, 1867, the arbitrator made and published his award in writing, and thereby, amongst other things, awarded that the said agreement of the 8th of March, 1862, was a valid agreement; and that such agreement should be cancelled; and that the Earl of *Shrewsbury* should pay to Mrs. *Jones* the sum of £5513 17*s.* 3*d.*, and her costs of the action and suit, and of the award.

The Earl died after the date of the award, and upon his estate

being administered under a suit in this Court, Mrs. *Jones* carried in a claim to rank in regard to the £5513 17*s.* 3*d.* as a specialty creditor, and to have priority over the simple contract creditors.

It was stated that if the debt was entitled to rank as a specialty Mrs. *Jones* would be paid her debt in full; but if it were to be considered as a simple contract debt she would not receive more than 10*s.* in the pound.

Mr. *Millar*, for the claimant:—

The debt now claimed by Mrs. *Jones* was awarded under the arbitration in respect of the rent owing to her since the date of the agreement, in 1862, and although the agreement was not under seal, still she is entitled to rank as a specialty creditor as for rent. That rent ranks as a specialty debt was decided in *Thompson* v. *Thompson* (1), where the Judge who tried the case said: "I have been in error all my life unless money due for rent in respect of land demised, whether by deed or parol, be not of fully equal degree with a specialty debt." So in *Clough* v. *French* (2) it was held that on an administration of assets in a Court of Equity a debt for arrears of rent has priority over simple contract debts, although the administrator will not be personally responsible for payment of simple contract debts in priority to a debt for arrears of rent of which he has no notice. These decisions were recognised as the law of the Court in *Kidd* v. *Boone* (3), where it was held that a claim for the sums due for arrears of rent and dilapidations under covenants agreed to be entered into were debts by specialty against the lessee's estate. The contention between the parties was whether Mrs. *Jones* had power to enter into this agreement to grant the lease in question, and the arbitrator, by deciding that the agreement was a valid agreement, must have considered that she had the power to grant the lease, and if so, rent, as a matter of course, was payable under it, and the damages must have been the equivalent for the rent.

The case of *Doe* v. *Amey* (4) decides that the Court has authority to order a party by rule to pay a specific sum of money awarded by an arbitrator to be paid by him, and on such rule being made

(1) 9 Price, 464, 471.
(2) 2 Coll. 277.
(3) Law Rep. 12 Eq. 89.
(4) 8 M. & W. 565.

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absolute, execution may issue against the party for the amount so specified in the rule. And in *Jones* v. *Williams* (1) it was held that execution cannot be levied on the award without obtaining a rule to shew cause why he should not pay; but when the award is approved by the Court it becomes binding as a judgment. The decision in *Jones* v. *Williams* turned on the harshness of issuing execution on an award which might turn out to be faulty, but it did not affect the right of the person to whom the sum was awarded to stand in the position of judgment creditor, as against third parties.

In this case the amount claimed under the award of the arbitrator must be treated as a specialty debt.

Mr. *Cotton*, Q.C., and Mr. *Davey*, for the Plaintiff, the residuary legatee.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for creditors; and

Mr. *Bristowe*, Q.C., and Mr. *Everitt*, for some of the Defendants, were not called upon to address the Court.

SIR R. MALINS, V.C.:—

The question I have to decide is whether this is a specialty debt An action was brought that resulted in a reference to arbitration. The claim was for a sum of money. The arbitrator has awarded a certain sum to be paid on a certain day, and if it is not a question of rent it is perfectly clear that there is not anything constituting it a specialty debt. It is a debt under an award. As to the argument that the submission is equivalent to a judgment, it is enough to say that in this case execution could not issue. The only other point is that the award being under the hand and seal of the arbitrator, that made it a specialty debt, but in such a case it must be a contract under the seal of the debtor. There is no other principle under which it can be constituted a specialty debt unless it can be shewn that it is for rent. The contract out of which the reference rose was a contract between the late Earl and Mrs. *Jones* for a lease of certain lands in *South Wales* for mining purposes. An action was brought for rent and damages. A reference was made, and the points referred were whether the lease should

(1) 11 A. & E. 175.

be cancelled, or what should be done. The referee determined that the lease should be cancelled, and that a sum of £5513 17*s.* 3*d.* should be paid. The lease therefore was cancelled. I conjecture that in arriving at this conclusion the arbitrator must have taken the question of rent into consideration, but it is not awarded as rent, and it is impossible to know what view he took. It was in reality awarded as damages, and as damages there is nothing to make it a specialty debt. Under the authorities quoted by Mr. *Millar*, I should be bound to come to the conclusion that rent is a specialty debt, but then it must be distinctly shewn that the claim is for rent only, before it would rank as a specialty debt in priority of payment. That the doctrine as to specialty debts ought not to be extended is undoubted. I fail to see that there was anything awarded for rent; and as an award for damages, it must come *pari passu* with the other debts. The justice of the case will, I think, be met by ordering that the costs of all parties properly appearing should be paid out of the estate. The claimant must pay her own costs.

Solicitors for the Claimant: Messrs. *Bell, Brodrick, & Gray.*
Solicitors for the Plaintiff: Messrs. *Farrer, Ouvry, & Co.*
Solicitors for the Defendants: Messrs. *Parkin & Pagden.*

ARNOLD *v.* WOODHAMS.

[1872 A. 88.]

Married Woman—Separate Estate—Restraint on Anticipation—Fraud.

There is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint on anticipation appears from the instrument in respect of which relief is sought.

A married woman who had previously to her marriage settled certain property upon trust for herself during the joint lives of herself and her husband for her separate use, without power of anticipation, and after the death of one of them for the survivor for life, and after trusts for the benefit of the children of the marriage, upon such trusts as she should by deed or will appoint, and (there being no children of the marriage) had by deed irrevocably appointed her reversionary interest in favour of her mother, subsequently, and, as she alleged, under the compulsion of her husband, made

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13 Ch D 441

another absolute irrevocable appointment of her reversionary interest in favour of her husband without noticing the previous appointment. The husband deposited the appointment in his favour to secure a debt to himself:—

Held, on bill filed by the assignee of the debt and security, that, assuming the second appointment to be fraud on the part of the wife, inasmuch as it was not based upon any active misrepresentation by her, but disclosed the restraint on anticipation, and only attempted to deal with the reversionary interest, the assignee of the security was not entitled to impound the income during her life to make good his loss by such fraud.

THIS was a motion to discharge an order made *ex parte* in the Long Vacation, on the 11th of October, 1872.

The Defendant Mrs. *Woodhams*, who was married to the Defendant *George Woodhams* on the 14th of April, 1864, had, by or under two deeds executed before the marriage and dated the previous day, and to which the husband was a party, vested certain real and personal property, to which she was then absolutely entitled, in two of the Defendants, as to the real estate, upon trust for sale, and as to the whole, upon trust for herself during the joint lives of herself and her husband for her separate use, without power of anticipation, and after the death of one of them, upon trust for the survivor for life, and after the death of the survivor, upon certain trusts for the children of the marriage, with an ultimate trust for herself absolutely if she survived her husband, and, in case of his surviving, as she should by deed or will appoint, and in default of appointment, for the persons who would have become entitled if she had died intestate and unmarried.

There had been no issue of the marriage.

On the 30th of March, 1869, Mrs. *Woodhams* executed an absolute and irrevocable deed of appointment of her reversionary interest in the settled property in favour of her mother.

On the 3rd of August, 1869, she executed another absolute and irrevocable appointment of the same reversionary interest in favour of her husband. This deed recited the trusts of the settlement under which it affected to be an appointment, but did not refer to the appointment in favour of the mother.

The bill alleged, by paragraph 10, that the appointment of the 3rd of August, 1869, was made by Mrs. *Woodhams* in collusion with her husband, and with the fraudulent intent of giving him a false credit, and of enabling him to obtain, without immediate pay-

ment, and upon the security of his pretended interest under that appointment, supplies of goods for the purposes of his trade, which he then carried on, and that accordingly the deed of appointment was immediately delivered to him for that purpose by Mrs. *Woodhams*.

Mrs. *Woodhams*, however, stated in her evidence that her execution of the second appointment was obtained from her by her husband under the influence of fear without her having read it, and under a promise to return it to her, which was never fulfilled.

The husband deposited the appointment with a corn dealer named *Chamberlain*, to secure either a then existing debt or a future supply of goods to carry on his business; and it appeared that he had suppressed all information about the previous appointment in favour of his wife's mother. *Chamberlain's* debt amounted to £182, and on the 4th of August, 1871, the Plaintiff, who was a country solicitor, paid *Chamberlain* the £182, and the deed of appointment was deposited with him by way of security. He also made further advances to *George Woodhams* on the same security, together with a policy of assurance on his life. *George Woodhams* was now insolvent, and did not appear.

The bill prayed a declaration that Mrs. *Woodhams* was liable to pay and make good out of the separate estate the sums advanced by the Plaintiff, and that the trustees of Mrs. *Woodhams'* marriage settlement might be ordered to pay all arrears of Mrs. *Woodhams'* income, and all future income, to the Plaintiff till his debt was discharged. It also asked for an injunction to restrain the trustees from paying Mrs. *Woodhams* any arrears of income, or any future income, till the Plaintiff was fully paid off.

The bill was filed on the 11th of October, 1872, and an *ex parte* injunction against the trustees obtained. The present motion was to discharge the order so obtained.

A good deal of evidence had been gone into on the question whether Mrs. *Woodhams* had any fraudulent intent in executing the appointment, or acted merely on compulsion, but her counsel were stopped by the Court before going fully into it. It was admitted that there were no arrears of income.

Mr. *Bristowe*, Q.C., and Mr. *Hastings*, in support of the motion:—

It is part of Mrs. *Woodhams'* case that she acted under the

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compulsion of her husband in executing the deed of appointment in his favour; but, assuming paragraph 10 of the bill to be proved, it is not such a fraud as will give the Plaintiff the right to impound the future income accruing under the settlement: *Pemberton* v. *M'Gill* (1). There must be an active fraud committed by the party against whom the relief is asked, or otherwise such an equity might be made a device to get rid of the restraint on anticipation: *Jackson* v. *Hobhouse* (2); *Clive* v. *Carew* (3).

Mr. *Northmore Lawrence*, for the trustees.

Mr. *Glasse*, Q.C., and Mr. *Phear*, for the Plaintiff:—

If Mrs. *Woodhams* concurred with her husband in executing the deed of appointment, it was a legal fraud. *Jackson* v. *Hobhouse* was in effect a suit to set aside a settlement altogether, and the case cannot now be maintained to its full extent. It is impossible consistently with it that a married woman can commit a fraud; and notwithstanding *Clive* v. *Carew*, that doctrine cannot be maintained in the face of *Vaughan* v. *Vanderstegen* (4) and *Sharpe* v. *Foy* (5). In the latter case, if *Clive* v. *Carew* had been considered an authority it would have been referred to. It is the nearest case to the present; and *In re Lush's Trusts* (6) shews that the matter is still open. It is against equity to allow a married woman to take her separate estate if she has committed a fraud.

Restraint on anticipation is a mere device of the Courts of Equity, and cannot enable a woman, merely by settling her own property in that way, to escape being made answerable for her fraud. In *Robinson* v. *Wheelwright* (7), which is referred to in *Clive* v. *Carew*, the restraint on anticipation was not imposed by the party seeking to be protected by it.

Sir R. Malins, V.C., after stating the facts of the case, continued:—

For the purposes of this decision I assume that Mrs. *Woodhams* knew the nature of the deed she was executing. On this assumption the Plaintiff charges that there was a fraud on the part of Mrs.

(1) 1 Dr. & Sm. 266.
(2) 2 Mer. 483.
(3) 1 J. & H. 199.
(4) 2 Drew. 363.
(5) Law Rep. 4 Ch. 35.
(6) Ibid. 591.
(7) 6 D. M. & G. 535.

Woodhams which entitles him to lay hold of the income of her separate estate, which she is restrained from anticipating, towards making good his loss. It is to be observed that the appointment shews on its face that it is not intended as a present security, and does not profess to do more than appoint a reversionary interest. Now *Vaughan* v. *Vanderstegen* (1) is cited as an authority in favour of the Plaintiff. No doubt it is a rule of this Court that a married woman will not be allowed to commit a fraud, and if she does so, the Court will lay hold of any property she may have to perform a contract she may have entered into by means of any fraudulent misrepresentation.

But what is the fraud alleged in this case? There is no misrepresentation as to the *status* of Mrs. *Woodhams*, and no statement that she had not made a previous appointment. She simply acted so as to enable her husband by misrepresentation to commit a fraud; and it is said that gives the right to impound the income of her property which she was restrained from anticipating. I am of opinion that there is no such equity where notice of the restraint on anticipation appears on the document in respect of which the relief is sought.

It is said that the rule laid down by Lord *Eldon* in *Jackson* v. *Hobhouse* (2) has been modified by recent decisions, and will not now be supported where the lady herself was the settlor; but in *Clive* v. *Carew* (3) this was the case, and that did not prevent Vice-Chancellor *Wood* from following *Jackson* v. *Hobhouse*. I think his decision applies entirely to the present case; and I agree with the view he expressed that, "upon the whole, it is the sounder course to adhere to the view taken by Lord *Eldon* in *Jackson* v. *Hobhouse*, namely, that, having once sanctioned this species of protection to a married woman by making it impossible for her in any way whatever to deal with the fund, the Court . . . . must go on to hold her interest in the fund protected even against her own fraudulent acts."

I have assumed, for the purpose of this decision, that Mrs. *Woodhams* did commit the fraud charged. I am of opinion that that circumstance, if true, would not enable the Court to grant any relief as against the income of her separate estate.

(1) 2 Drew. 363. (2) 2 Mer. 483. (3) 1 J. & H. 199, 206.

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[His Honour then referred to the affidavits as not appearing likely to bear out the assumption of such a fraud, and continued:—]

The order must therefore be discharged with costs. *In re Lush's Trusts* (1) throws no doubt upon the previous cases. I do not see how any other conclusion was possible in that case. The Court simply held that a married woman could not set up her equity to a settlement against an active fraud committed by her.

Solicitors: Messrs. *Dangerfield & Fraser;* Messrs. *Scott & Co.*

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PARKIN *v.* SEDDONS.

[1873 P. 48.]

Practice—Receiver pendente lite—Probate Court—Caveat.

The Court may appoint a receiver of personal estate pending the grant of probate which has been delayed on account of a caveat having been entered where a suit in the Probate Court has not been actually constituted.

The Court will, also, under the same circumstances, appoint a receiver *pendente lite* of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession.

THIS was a bill filed to obtain a receiver of the rents of real estate and outstanding personalty pending the grant of probate to the Plaintiff.

Robert Seddons, by his will, dated the 20th of December, 1872, gave his residuary real and personal estate to the Plaintiff, and appointed him his sole executor. He was at the time of his death possessed of some real estate, consisting of cottages, as well as some personalty.

The Defendant alleged himself to be the heir-at-law and one of the next of kin of the testator, and after his funeral took possession of some of his papers. He had also remained in possession of one of the cottages, of which he was previously in occupation as tenant.

The Plaintiff applied for a grant of probate, but discovered that a caveat had been entered by the Defendant against the grant to him. The Defendant had also endeavoured to make the tenants

(1) Law Rep. 4 Ch. 591.

of the real estate attorn to him. The bill alleged that no other proceedings had been taken in the Court of Probate, and it was doubtful whether that Court had jurisdiction to appoint a receiver. It also alleged that the Defendant was a person of no means, but the Defendant put in evidence in dispute of this statement.

The bill asked for an injunction to restrain the Defendant from issuing or enforcing notice to the tenants of the real estate to attorn to him, and from taking or retaining possession of the papers of the testator, as well as for a receiver of the rents of the real estate and the outstanding personalty.

The present motion was for an injunction and receiver accordingly.

Mr. *Glasse*, Q.C., and Mr. *E. Cutler*, for the Plaintiff:—

An administrator *pendente lite* cannot be appointed by the Court of Probate till litigation is commenced, which is not till there has been an appearance to the caveat, and it is only in that case that this Court will decline to appoint a receiver where protection is required: *Veret* v. *Duprez* (1).

Mr. *Higgins*, Q.C. (Mr. *North* with him), for the Defendant:—

The Court cannot appoint a receiver *pendente lite* of real estate: *Hitchen* v. *Birks* (2). As regards personalty, a stronger case is required now than formerly to induce the Court to appoint a receiver. But even under the old law a receiver would not be appointed under circumstances similar to the present: *Watkins* v. *Brent* (3); *Newton* v. *Ricketts* (4); *Williams* v. *Attorney-General* (5); *Jones* v. *Jones* (6). Moreover, the Court of Probate has acquired jurisdiction by the caveat, and an application for an administration *pendente lite* may be just as easily applied for in the Probate Court as a receiver in this Court. The application, therefore, as regards the personalty, is quite uncalled for.

Mr. *Glasse*, in reply:—

Hitchen v. *Birks* establishes the practice of the Court, that

(1) Law Rep. 6 Eq. 329.
(2) Ibid. 10 Eq. 471.
(3) 1 My. & Cr. 97.
(4) 10 Beav. 525.
(5) Seton on Decrees, 3rd Ed. p. 1003.
(6) 3 Mer. 161.

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where an administrator has not been appointed in the Probate Court, a receiver may be appointed by this Court. As regards the real estate, a receiver will be appointed or not, according as one of the claimants is or not in possession: *Carrow* v. *Ferrior* (1). There is no suit commenced in the Probate Court till the party entering the caveat has appeared on the caveat, being warned by the party asking for probate. There is, therefore, no conflict of jurisdiction.

SIR R. MALINS, V.C.:—

It happens that, under sects. 70 and 71 of the *Court of Probate Act*, 1857, the Court of Probate has power to appoint an administrator and receiver *pendente lite*, but that power has not been exercised in the present case. Therefore this is the common bill for a receiver *pendente lite*. Now there can be no doubt that this Court has exercised from time immemorial the power of appointing a receiver of personalty *pendente lite*. There is, however, more difficulty as to the real estate, because where one party is in possession a party seeking to dispossess him must do so by shewing a better title. Therefore, so far as the Defendant is in actual possession, I cannot appoint a receiver. But to shew that there is jurisdiction where there are rents which may be received, it is only necessary to refer to the case of *Hitchen* v. *Birks* (2), in which the Master of the Rolls held that the jurisdiction still existed.

With regard to the personalty, the question has been already decided by me in *Veret* v. *Duprez* (3), where I held that the Court would exercise the jurisdiction if no proceedings had been taken in the Court of Probate. With regard to the rents of the real estate, of which the Defendant is not in possession, every rule of convenience requires that the same course should be adopted.

I must express my surprise that so much time has been taken up in considering by which of the two Courts protection should be given to the property.

Solicitors: Messrs. *Kynaston & Gasquet;* Messrs. *Norris, Allens, & Carter.*

(1) Law Rep. 3 Ch. 719. (2) Law Rep. 10 Eq. 471.
(3) Law Rep. 6 Eq. 329.

TURNER *v.* RENNOLDSON.

V.-C. M.
1873
April 23.

Jurisdiction of County Court—Administration Suits—Assignee of Next of Kin.

The County Courts have power, under the *County Courts Equitable Jurisdiction Act* (28 & 29 Vict. c. 99), to entertain administration suits instituted by the assignees and representatives of next of kin, and of the other classes of persons specified in sect. 1, sub-sect. 1 of that Act.

THIS was an appeal from the County Court of *Northumberland,* holden at *North Shields.*

The Appellant filed a plaint for the administration of the personal estate of *John Rennoldson,* who died intestate in 1833, leaving *Mary Rennoldson* his widow and the Defendants and some other children his next of kin, and letters of administration were duly granted to *Mary Rennoldson,* who died in June, 1858, having by her will, dated in February, 1853, given all her property to the Defendant *Maria Rennoldson,* her executrix.

On the 1st of January, 1861, *Maria Rennoldson* mortgaged her share and interest under the will of *Mary Rennoldson,* and under the intestacy of *John Rennoldson,* in the leasehold premises forming part of his estate, for securing to the Plaintiff the sum of £63 11*s.* 11*d.*, with interest, which sum still remained unpaid.

On the 31st of January, 1861, letters of administration of the estate and effects of *John Rennoldson* left unadministered by *Mary Rennoldson* were granted to the Defendant *William Rennoldson.* The intestate's personal estate did not exceed in value the sum of £500.

The Plaintiff prayed that an account might be taken of the personal estate of *John Rennoldson,* and that the same might be duly administered under the decree of the Court; and that a receiver might be appointed of the rents and profits of the leasehold premises and the outstanding personal estate of the intestate.

On the hearing of the suit on the 17th of October, 1872, the Judge dismissed the same with costs, on the ground that he had no jurisdiction to entertain it, the Plaintiff not being one of the next of kin of the intestate, or otherwise coming within the classes specified in sub-sect. 1, sect. 1, of the *County Courts Equitable Juris-*

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diction Act, 1865 (28 & 29 Vict. c. 99); and against this decision the Plaintiff appealed.

The question for the opinion of this Court was, whether or not the Judge of the County Court had jurisdiction, under sect. 1 of the *County Courts Equitable Jurisdiction Act*, to entertain the suit and grant relief to the Appellant thereunder.

The 1st section enacts that the County Courts shall have and exercise all the power and authority of the High Court of Chancery in all suits by creditors, legatees, devisees, heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made, shall not exceed in amount or value the sum of £500.

Mr. *Jackson*, Q.C., and Mr. *Swan*, for the Appellant:—

The preamble of the *County Courts Equitable Jurisdiction Act* recites that it is desirable to confer on the County Courts an equitable jurisdiction in certain specified cases therein mentioned. The words of this section confer the same jurisdiction on the County Courts as the *Chancery Improvement Act* (15 & 16 Vict. c. 86), ss. 45 and 47, confers upon the High Court of Chancery; and if the Court of Chancery has jurisdiction under that Act to order the administration of intestates' estates on summons by a person not strictly within the words of sects. 45 and 47 of that Act, the same principle would apply to the County Courts. In *Daniell's* Chancery Practice (1), it is said that, although not strictly within the words of sects. 45 and 47, it is the established practice to make administration orders on the application of persons claiming under persons therein mentioned, and against the representatives of deceased executors; and many cases are cited in which this has been done.

Mr. *Bush*, for the Defendant:—

The Judge of the County Court decided this case simply on the ground of want of jurisdiction. The only jurisdiction he can have is under the statute, and it cannot be carried further than the actual words of the section, which only include suits instituted by "creditors, legatees, devisees, heirs-at-law, or next of kin." No

(1) 5th Ed. vol. ii. p. 1071.

persons who are not expressly mentioned can be brought within the terms of the section. The practice is said to be fixed in the Courts of Chancery upon summonses under the *Chancery Improvement Act;* but this is not quite so clear, as appears by the note in *Morgan's* Chancery Orders (1), where it is said, "Whether the assignee or mortgagee of a residuary legatee can obtain the summons seems to be doubtful;" and the case of *Whittington* v. *Edwards* (2) is cited as an authority. But even if it were the practice under the *Chancery Improvement Act,* it would not follow that the County Court Judges would be justified in exceeding their jurisdiction.

SIR R. MALINS, V.C.:—

This is the plainest case that could have been brought before the Court. The object of the *County Courts Equitable Jurisdiction Act* was to extend the jurisdiction of the Court of Chancery in certain cases to the County Courts. The words of the 1st section are, that the County Courts shall have and exercise all the power and authority of the High Court of Chancery in certain cases, and the first sub-section includes all suits by creditors, legatees, devisees, heirs-at-law, or next of kin, in which the personal or real estate against or for an account or administration of which the demand may be made, shall not exceed in value the sum of £500. In the case before me the plaint is filed, not by one of the next of kin, but by an assignee for value of one of the next of kin. The Judge has decided that the words of the statute give him jurisdiction only in cases where the Plaintiff is one of the next of kin or one of the persons actually specified in the Act, and as the Plaintiff is not one of the next of kin, he cannot maintain the suit. Now, if that decision were right, it would follow that if a man died leaving a sole next of kin, and that next of kin died, his legal personal representative could not maintain a suit to administer the estate, because he would not be within the words of the Act.

The Act is not to be construed so as to defeat justice, but is to receive such a liberal interpretation as will forward justice; therefore, in my opinion, it must be construed to apply to those who represent the persons mentioned in the 1st section of the Act,

(1) 3rd Ed. p. 202. (2) 3 De G. & J. 243.

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or those who claim the interest of such persons. It is not intended to apply to the individuals so much as to the interest represented by a particular class of cases.

That would have been the decision I should have arrived at if there had been no guide to sanction this view, but the words found in the *Chancery Improvement Act* (15 & 16 Vict. c. 86) are sufficient to prove that this must be the right construction of the *County Courts Act*. By the 45th section of the *Chancery Improvement Act* there is power given to the Judge in Chambers to make administration decrees upon summonses by any person claiming to be a creditor, or a specific pecuniary or residuary legatee or next of kin, or some or one of the next of kin of a deceased person—precisely similar words to those used in the *County Courts Act;* and these words have always been understood to include persons representing those several classes of cases. In fact, if it were not so, it would follow that all the decrees made by this Court under that Act and with that understanding would have been wrong, whereas it is settled that the words of the Act mean all those persons who represent the several interests there stated. Here it is an assignee for value who files the bill, and I am clearly of opinion that the Judge of the County Court has miscarried, and that the assignee has the same right of suit that the next of kin would have had. The decision, therefore, must be reversed, and it must be declared that the Judge has jurisdiction, under the 1st sub-section of the Act, to entertain the suit, and to grant relief to the Appellant thereunder. And in pursuance of the rule I have laid down in former cases, I cannot do otherwise than give the costs to the Appellant.

Solicitors for the Plaintiff: Messrs. *Pattison, Wigg, & Co.*
Solicitor for the Defendants: Mr. *S. R. Hoyle.*

In re WIGHT'S MORTGAGE TRUST.

V.-C. M.
1873
April 18.

Registered and Unregistered Mortgages—Priority of Charges—Yorkshire Registry Act (5 *Anne*, c. 18).

A. executed a legal mortgage of property in *Yorkshire* to *B.* for £700; at the same time he borrowed £100 from *C.*, and signed a memorandum agreeing to give *C.* a second mortgage on the property to secure that amount. *A.* subsequently executed another mortgage of the property for £500 to *D.* The first and third mortgages were registered at *Wakefield*, but not the second:—

Held, that the third mortgage had priority over the second.

THIS was a Petition by *George H. Jackson* and *W. Jackson*, stating that—

On the 4th of May, 1867, *Andrew Wight* mortgaged five houses at *Worsborough Dale*, in *Yorkshire*, to *William Richard Holland*, to secure the repayment of £700 and interest at £5 per cent, and the mortgage deed contained a power of sale in default of payment of the money so advanced. This mortgage was registered at *Wakefield*. On the 29th of November, 1871, *Andrew Wight* executed another mortgage of the same property to *George Henry Jackson* and *William Jackson*, subject to the mortgage of the 4th of May, 1867, to secure the repayment of the sum of £500 and interest thereon. Notice of this mortgage was given to *W. R. Holland* on the 13th of December, 1871, and it was duly registered at *Wakefield* on the 18th of December, 1871.

In March, 1872, *Andrew Wight* entered into an arrangement with his creditors for the liquidation of his affairs under the Act of 1869, and *Charles Bailey* was appointed trustee of his estate.

On the 21st of November, 1872, *William Holland* filed an affidavit in the matter of the arrangement, wherein he stated that *Andrew Wight* had paid him £150, part of the sum of £700 so advanced to him upon the mortgage security of the 4th of May, 1867; and he further stated that on the 2nd of May, 1867, *A. Wight* had borrowed from a client of his, named *Joseph Dickenson*, the sum of £100, and had thereupon signed and delivered to *J. Dickenson* a paper writing to the following effect:—"Mr. *J. Dickenson* having this day advanced me £100, I hereby agree that I will, as soon as I conveniently can after the completion of my conveyance from

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Mr. *Bell* of five houses at *Worsborough Dale*, and the mortgage, to Mr. *Holland* for £700, give to the said *J. Dickenson* a second mortgage on the said property for securing the said sum of £100 and interest at £5 per cent. per annum: a promissory note to be also given." This memorandum was never stamped, or registered in the *Wakefield* Registry, and no notice thereof was given to Messrs. *G. H.* and *W. Jackson* until the 13th of April, 1872.

On the 3rd of April, 1872, the property comprised in the mortgage was put up for sale by Mr. *Holland*, the mortgagee, under the power of sale in the mortgage, and was sold for £785.

The sum remaining due to Mr. *Holland*, with the interest, costs, charges, and expenses incurred by him, amounted to £598 19*s.* 2*d.*; leaving in his hands a surplus of £186 0*s.* 10*d.* Out of this sum Mr. *Dickenson* claimed to be entitled to payment of the £100 and interest due to him in priority to the debt due to the Messrs. *Jackson*. A negotiation took place between the parties, with a view to an arrangement, but as both parties urged their rights Mr. *Holland* paid the money remaining in his hands into Court, and this Petition was presented by Messrs. *G. H.* and *W. Jackson*, praying that the sum so paid into Court by Mr. *Holland* might be paid out to them.

From the affidavits filed upon the hearing of the Petition, the following letters appeared to have passed between the parties. On the 2nd of November, 1871, Mr. *J. Dibb*, the Petitioner's solicitor, wrote to Mr. *Holland*:—

"Dear Sir,—I am informed that you hold the title-deeds relating to some property in *Worsborough Dale* belonging to Mr. *Wight*, and upon which a client of yours has a mortgage. Mr. *Wight* is proposing to give a second mortgage to some clients of mine, and to enable me to prepare it I shall be glad if you will send me a copy of your client's mortgage, say to the end of the proviso for redemption. I shall be glad to pay your charges."

Mr. *Holland* answered on the 4th of November, 1871:—

"Dear Sir,—I herewith forward you copy of mortgage belonging to Mr. *A. Wight*, to the end of proviso for redemption. The charges are on the other side. I presume you will give notice of the second mortgage."

Mr. *Dibb* wrote to Mr. *Holland*, November 6th, 1871:—

"Dear Sir,—I enclose you Post Office order for £1 0*s.* 7*d.* Please acknowledge receipt, and at the same time inform me if the whole £700, and what interest, is owing; as I was informed that Mr. *Wight* was paying the mortgage off by instalments. I shall give you notice of the second mortgage."

Mr. *Holland* answered that £150 had been paid off, and only £550 remained due upon the mortgage.

On the 12th of April, 1872, Mr. *Dibb* wrote to Mr. *Holland*:—"I understand that you have sold this property to Mr. *Charles Wright*, of this town. My clients, Messrs. *Jackson*, the second mortgagees, will be glad to concur in the sale and join in the conveyance to Mr. *Wright*, and receive the balance of the purchase-money after the mortgagee's principal, interest, and expenses are satisfied."

Mr. *Holland* answered on the 13th of April, 1872:—"A title will be made under the mortgage, and your clients will not be required to join in the conveyance. Mr. *James Dickenson* is entitled to receive his £100 and interest in priority to your clients. The balance I shall hand to Messrs. *Jackson*."

The following day, April 14, Mr. *Dibb* wrote to Mr. *Holland*:—"I am surprised to learn that Mr. *Dickenson* has a prior mortgage to my clients. I must ask you to accept this as notice not to pay over any money to him until I have been duly satisfied of his priority."

Among the affidavits was one by Mr. *Dickenson*, stating that he had borrowed the £100 to lend to Mr. *Wight*, who was his brother-in-law, and who wanted the money to complete the purchase he was then about to make of the *Worsborough Dale* property. That he had asked Mr. *Holland*, who acted as the solicitor for Mr. *Wight*, what security he was to have, and Mr. *Holland* said he could have a second mortgage, which he would prepare. That Mr. *Holland* had then prepared the memorandum of the 2nd of May, 1867, and had himself witnessed the signature of Mr. *Wight*. By an affidavit in reply, Mr. *Holland* stated that he never was in any way concerned as attorney or solicitor of Mr. *Dickenson*, and denied that he ever advised him to advance any money to *A. Wight*, or that he asked the deponent what security

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he could have. The loan took place entirely without his knowledge, and the said sum of £100 was, as he understood at the time, agreed to be lent upon a promissory note. He had, however, suggested to Mr. *Wight* that he should also give a memorandum to constitute an equitable mortgage in favour of Mr. *Dickenson*, and he had drawn up and witnessed the document set out, but did not say he would prepare a second mortgage, nor receive instructions from Mr. *Wight* to do so.

Mr. *Glasse*, Q.C., and Mr. *Humphrey*, in support of the Petition :—

The simple question in this case is whether a mortgage of property in *Yorkshire*, which has been duly registered, is or is not to have priority over an equitable mortgage which has not been registered. We say that the Petitioners' mortgage, which has been duly registered, must rank before *Dickenson's* charge. When the Petitioners were proposing to lend this money they informed Mr. *Holland*, the first mortgagee, of their intention, and though he sent the mortgage deed to their solicitor, yet he gave them no information as to *Dickenson's* claim. They were guilty of no negligence, but took all the precautions that were possible. The authorities are in favour of the Petitioners' present contention. It is true that the Master of the Rolls, in the case of *Wright* v. *Stanfield* (1), decided that an agreement to execute a mortgage upon a *Middlesex* property did not come within the *Registry Act*, but his Lordship in effect overruled his own decision in the later case of *Moore* v. *Culverhouse* (2), although he drew a distinction between the cases in saying that the mortgage in the previous case was merely executory. It was an agreement at a future time to execute an assignment, which assignment, therefore, could not be registered until it was executed. His Lordship seems to have decided chiefly upon the authority of *Sumpter* v. *Cooper* (3), but in that case there was nothing but a mortgage by a deposit of deeds without any memorandum, so in fact there was nothing to register. But this question is settled by the case of *Neve* v. *Pennell* (4), decided by Lord *Hatherley* when Vice-Chancellor,

(1) 27 Beav. 8. (3) 2 B. & Ad. 223.
(2) Ibid. 639. (4) 2 H. & M. 170.

where it was held that an agreement to deposit title deeds in *Middlesex* to secure the payment of a debt, with a provision that a legal mortgage should be given on demand, was a document requiring registration under the statute 7 Anne, c. 20.

Mr. *Higgins*, Q.C., and Mr. *Simpson*, for Mr. *Dickenson*:—

It appears from the evidence that when Mr. *Wight* was about to purchase the property at *Worsborough Dale* he borrowed the sum of £700 from *Holland*, but in order to complete the purchase money he had recourse to Mr. *Dickenson*, who was his brother-in-law. Therefore his £100 was part of the purchase-money before the property was mortgaged. We were in truth purchasers of the property to the extent of £100. On that ground alone we have a special equity. But we say that the case is concluded by the decision in *Wright* v. *Stanfield* (1), which was precisely this case. It was an agreement to mortgage the property, and though not registered it was held to stand in priority to a later mortgage which was registered. In the subsequent case of *Moore* v. *Culverhouse* (2) there was a complete equitable assignment which vested the equitable interest in the mortgagee, and therefore required registration. Then we say that it was the duty of *Holland*, the first mortgagee, to have communicated to the Messrs. *Jackson* the effect of our charge. There is no doubt that *Holland* knew of it, for he actually prepared the memorandum himself. He was therefore acting as solicitor for *Dickenson*, and although in his affidavit he states that he was not aware of a mortgage having been effected, still he must be taken to have understood the purport of the memorandum which he himself prepared and witnessed.

[On the subject of constructive notice, they cited *Jones* v. *Smith* (3); *Whitbread* v. *Jordan* (4); *Wormald* v. *Maitland* (5).]

Mr. *W. Pearson*, for Mr. *Holland*.

SIR R. MALINS, V.C.:—

The facts of the case are these: In May, 1867, Mr. *Wight*, being about to purchase some property from Mr. *Bell*, borrowed a

(1) 27 Beav. 8. (3) 1 Hare, 43.
(2) Ibid. 639. (4) 1 Y. & C. Ex. 303, 328.
(5) 13 W. R. 832.

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sum of £100 from Mr. *Holland's* client, *Joseph Dickenson*, and as security for the amount gave *Dickenson* this memorandum in writing: "Mr. *J. Dickenson* having this day advanced me £100, I hereby agree that I will, as soon as I conveniently can after the completion of my conveyance from Mr. *Bell* of five houses at *Worsborough Dale* and the mortgage to Mr. *Holland* for £700, give to the said *J. Dickenson* a second mortgage on the said property for securing the said sum of £100, and interest at £5 per cent. per annum. A promissory note to be also given." This memorandum was dated the 2nd of May, 1867. There can be no question that, although in the form of a memorandum, this document would be a valid charge immediately, and would operate as such. *Dickenson* therefore acquired a valid charge on the property to rank as second mortgagee. Then, on the 4th of May, two days after this memorandum was signed, there is the deed executed creating a legal mortgage on the property for £700 in favour of *Holland*. The title-deeds were delivered to *Holland*, so that he became first mortgagee of the legal estate, and the property being situate in a register county, the mortgage was duly registered by *Holland*. The parties, therefore, were at that time in this position: *Holland* was first mortgagee for £700, and *Dickenson* was second mortgagee for £100, and so matters stood until the 29th of November, 1871, when *Wight*, the mortgagor, being indebted to the Petitioners *Henry* and *William Jackson* to the amount of £500, proposed to give them a mortgage on the same property to secure that sum of money. It appears that upon the proposal to give this mortgage, the solicitor acting for the Messrs. *Jackson* wrote to Mr. *Holland* in order to ascertain the amount due upon the first mortgage, and in answer to this inquiry a copy of the mortgage deed was sent, accompanied by the information that £150 had been paid off from the £700. Mr. *Holland* at the same time sent his bill of costs for the expenses incurred in respect of the copy of the mortgage, and the amount was paid. In this correspondence the Petitioners were treated as persons about to become the second mortgagees, but no allusion was made to the mortgage to *Dickenson*. The mortgage of November, 1871, to the Petitioners was then executed, and that deed was registered on the 13th of December. Then, on the 3rd of April, 1872, the property

was sold under the power of sale in *Holland's* mortgage deed, and it produced more than the principal, interest, and costs due to *Holland*. A correspondence subsequently took place between the solicitors of all the parties, but no arrangement having been come to as to the claim raised by *Dickenson*, and *Holland* not knowing what to do with the surplus, paid the money into Court, and I have now to decide who is entitled to priority.

Now, it is perfectly true that if this were not in a register county all these charges would have ranked according to their priority of date; but the difficulty which arises is, that the property was in a register county, and under the terms of the Act of Parliament any charge or memorandum is capable of being registered, and when the registration is effected the charge takes rank according to the priority of registration.

What is the equity of *Holland's* client? He was bound to know as well as these Petitioners that it was his duty to register the charge, and that by neglecting to register it he enabled the mortgagor to commit a fraud upon any unregistered mortgagee. These Petitioners have not been guilty of any want of diligence. They did all that they could be expected to do. They made inquiries as to the amount of the existing first mortgage, and were told that the property was charged with a certain amount. How could they have known that *Dickenson* had a pocket mortgage which was not registered? It was impossible for them to have acquired this information.

Now with regard to the authorities. It seems to me that the question is perfectly well settled, although it is true that a doubt may have arisen in consequence of the contradictory decisions of the Master of the Rolls. In the case of *Wright* v. *Stanfield* (1) the Master of the Rolls decided that an agreement to mortgage a property in *Middlesex* did not come within the *Registry Act*, and that nothing but an instrument under seal can be registered; but that decision is evidently not the rule of the Court. I confess I am surprised to find that the Master of the Rolls came to the conclusion he did in that case; but it is so contrary to my view of what the rule of the Court is, that I should not have felt myself bound to follow that decision. However, I am relieved from any

(1) 27 Beav. 8.

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difficulty by the Master of the Rolls himself, who, in a later case of *Moore* v. *Culverhouse* (1), came to a different conclusion, and decided that an unregistered equitable charge on the equity of redemption of a property in *Middlesex* was postponed to a subsequent registered mortgage. In my opinion these two cases cannot possibly stand together, and I think it clear that His Lordship in the second case overruled his own decision in the former, and that, certainly, was the opinion of Lord *Hatherley* when, as Vice-Chancellor, he decided *Neve* v. *Pennell* (2). In that case there was an agreement that a deposit of title-deeds of property in *Middlesex* should be made to secure the payment of a debt, and it contained a provision that a legal mortgage should be given upon demand. This was held to be a document requiring registration under the statute of *Anne.* Vice-Chancellor *Wood,* in his judgment, discussed the two cases decided by theMaster of the Rolls, and used this expression (3): "So far as the two cases can stand together, this case seems to me more analogous to *Moore* v. *Culverhouse;* and if they are to be taken as incompatible, I think that that case, which not only was later in date but also seems from the report to have been more fully argued, and in which his former decision was brought to the Judge's notice, is the safer authority to follow." I consider that as a decision that the case of *Wright* v. *Stanfield* (4) is not to be followed, and that *Moore* v. *Culverhouse* is to be considered as the rule of the Court.

On these grounds I am of opinion that where there is a contest as to priority between a registered and unregistered mortgagee, the registered deed must have priority over the unregistered deed.

I can see no case of constructive notice arising in this matter. The first mortgagee *Holland* was not asked in express terms whether there was any other charge existing upon the property, but if it was the duty of *Holland* to have given notice to the Petitioners, of *Dickenson's* charge, his answer is that he did not know that it was a charge in the nature of a mortgage. As far as the Petitioners are concerned the answer given to their inquiry shews that there was no other charge, and the Messrs. *Jackson,* by registering their security, gained priority over that charge which was not registered.

(1) 27 Beav. 639. (3) 2 H. & M. 187.
(2) 2 H. & M. 170. (4) 27 Beav. 8.

They are the only second mortgagees whose security is registered, and consequently they are at liberty to stand upon their rights in that respect.

The result is, that while *Dickenson* would have stood first in priority if this had been an unregistered county, he loses his priority in consequence of its being a register county, and the Petitioners must rank as second mortgagees.

Mr. *Glasse* asked that *Dickenson* might be ordered to pay the costs of all parties.

Mr. *W. Pearson* asked that *Holland's* costs might be provided for.

THE VICE-CHANCELLOR decided that the Petitioners were entitled to the whole fund which had been paid into Court, and ordered the costs, charges, and expenses of Mr. *Holland* to be taxed. The costs of the Petitioners, including the costs occasioned by payment out of Court and those paid to *Holland*, to be paid by the Respondent *Dickenson*.

Solicitors for the Petitioners: Messrs. *Torr, Janeway, Taggart, & Janeway.*

Solicitors for the Respondents: Messrs. *Brooksbank & Galland;* Mr. *Somerville.*

BAKER *v.* LOADER.

[1870 B. 293.]

Undue Influence—Fiduciary relation between Parties—Want of due Caution—Practice—Solicitor made Party for Discovery and Costs, and ordered to pay Costs—Suit improperly Defended.

A suit which had been instituted to set aside certain deeds and documents by which the Plaintiff had conveyed away the whole of her property, and to recover back the property lost by means of them, was defended on behalf of the party who claimed under the deeds by the solicitor who had prepared the documents sought to be impeached. The bill was then amended by making the solicitor a party for discovery, and asking that he might be ordered to

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pay the costs of the suit. The amended bill also contained charges of improper motives against him, which were not sustained:—

Held, that his having defended the suit on behalf of the principal Defendant, and endeavoured to support the transactions sought to be impeached, in addition to want of caution in the preparation of the documents themselves, were sufficient reasons for ordering him to pay the costs of the suit if the estate sought to be made liable were insufficient to pay them, notwithstanding that the charges against him were not sustained.

It was an additional circumstance against him that, when he acted as solicitor in the suit, he knew that the estate sought to be made liable would probably not be able to pay the costs of the suit.

Marshall v. *Sladden* (1) and *Harvey* v. *Mount* (2) discussed.

THE Plaintiff, Mrs. *Baker*, who was nearly eighty years of age, had in and previously to the year 1862 occupied a house at *Holloway*, where she partly maintained herself by taking in lodgers.

In that year one of her lodgers, *Mary Ann Robinson*, who appeared to have had no relations or friends of her own, died, leaving a will by which she made Mrs. *Baker* her residuary legatee, and as such she became entitled to not less than about £95,000. This fortune began to diminish very rapidly under circumstances which did not appear fully in the suit, and in the early part of 1864 it had become reduced to about £10,000.

At that time Mrs. *Baker* was staying at the *Coach and Horses* public-house at *Islington*, which was kept by one *John Loader*, who had acquired it by marrying the former proprietress, the Defendant *Sarah Loader*. He was at that time in embarrassed circumstances.

He induced the Plaintiff to believe that it would be for her advantage for him to devote himself entirely to managing her property, and he accordingly sold the public-house, and with his wife and family went to reside with the Plaintiff at her house at *Holloway*. He then began a course of conduct which resulted in his acquiring the whole of her property, and leaving her entirely dependent upon him for subsistence.

In March, 1866, he induced her to transfer to him a sum of about £4000 consols, representing that he would hold it as trustee for her, and he shortly afterwards obtained from her a power of attorney giving him the sole and absolute management of her property.

(1) 7 Hare, 428. (2) 8 Beav. 439.

On the 8th of May, 1866, she executed a deed by which she handed over nearly all her property to *Loader*, upon trust for herself for life, and after her death for such persons as she should appoint, and in default of appointment for her next of kin. This deed was prepared on behalf of both parties by Messrs. *Keighley & Gething*, and contained a power of revocation.

In September, 1866, *Loader* took a house at *Kingston-on-Thames* in his own name, and he and his family and Mrs. *Baker* went to reside there. While residing there *Loader* introduced to her a Mr. *Rastrick*, a solicitor practising there, and he, acting as solicitor for both parties, but generally taking instructions from *Loader*, prepared a succession of documents which were executed by Mrs. *Baker*.

The first was a deed of gift dated the 10th of October, 1866, by which she transferred absolutely to *Loader* a sum of £2000, which she held upon the security of a mortgage. The consideration was expressed to be certain services and assistance alleged to have been rendered by *Loader*. There was no power of revocation.

The second document was a will by which she gave the whole of her property, subject to some small legacies, to the Defendant *Sarah Loader*.

The third document was dated the 6th of November, 1867, and purported to be a deed of release to *Loader* from various sums of money, amounting in the whole to about £9000, alleged to have been received by him as her agent. This deed had been subsequently lost or destroyed. It appeared that Mr. *Rastrick* had never inquired into the correctness of the items of the account.

The fourth document was a deed of arrangement dated the 5th of February, 1868, by which Mrs. *Baker* irrevocably purported to transfer all her then remaining property, which was in value about £2000, to *Loader* absolutely, subject to the payment of certain costs for actions alleged to be pending for the recovery of parts of her property, *Loader* covenanting to pay her an annuity of £100 during her life on condition that she continued to reside with him, and he being at liberty to deduct from the £100 annuity a weekly sum towards payment of the rent and taxes of any house he might choose to reside in, and he was also to provide board and lodging for her. The annuity was not charged on the

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property comprised in the deed. All these deeds were prepared by Mr. *Rastrick*, and he was aware that by the last Mrs. *Baker* gave up all her remaining property.

Mrs. *Baker* was induced to execute one more deed, which was dated the 20th of April, 1869, and purported to be a release from various sums of money due to her from *Loader*. This deed was prepared by a solicitor named *Willis*, who seemed to have been introduced to her by *Loader*. He did not examine the items of which the account was made up.

Mrs. *Baker* continued to reside with *Loader* and his family till March, 1870, but he appeared never to have paid her any portion of the annuity. Her position had by that time become intolerable, and she left his house and went to that of a sister of hers. In July, 1870, *Loader* died, having by his will bequeathed all his property to the Defendant *Sarah Loader*, whom he appointed sole executrix.

Mrs. *Baker* had by this time come to the conclusion that she had been defrauded of her property, and she accordingly filed the original bill in the suit against Mrs. *Loader* as executrix of her husband to set aside all the dealings between herself and *Loader*, on the ground that they had been obtained from her by fraud and undue influence, and without independent advice, and asking for a declaration that he was her agent and a trustee of all her property which had come into his possession, and for accounts on that footing. It also asked for an administration of *Loader's* estate.

Mrs. *Baker's* knowledge of these transactions was very imperfect, and the particulars of the above-mentioned instruments and the connection of Mr. *Rastrick* with them first appeared distinctly on Mrs. *Loader's* answer, which raised every possible defence to the suit. This was prepared by Mr. *Rastrick* as solicitor, and filed by his *London* agents. Upon the facts appearing on the answer further information was required, which Mr. *Rastrick* was the only person able to give. The bill was accordingly amended by making him a party, alleging that he was a necessary party for discovery, and also charging him with fraud and collusion in the preparation of the deeds, and praying that he as well as *Sarah Loader* might be ordered to pay the costs of the suit. As regarded the last deed of

release, it alleged that *Willis* had been introduced to Mrs. *Baker* by *Rastrick*.

Mr. *Rastrick*, by his answer, stated that he received the instructions for the preparation of the several instruments from Mrs. *Baker* personally, as well as from *Loader*; that they were settled by counsel on her behalf; that they were prepared at her urgent request (which statement was supported by her correspondence); that they were read over and explained to her, and she appeared thoroughly to understand them; and that full knowledge of the nature of the instruments was given by the affidavit as to documents.

It was admitted, in the course of the arguments, that *Loader's* estate was insufficient to satisfy the covenants in the deed of the 8th of February, 1868.

Mr. *Glasse*, Q.C., Mr. *Decimus Sturges*, and Mr. *W. G. Harrison*, for the Plaintiff:—

The facts proved in this case clearly bring it, on the main question, within *Huguenin* v. *Baseley* (1), and the authorities collected under it in *White* and *Tudor's* Leading Cases in Equity (2). *Gibbs* v. *Daniel* (3) is also in point.

[The VICE-CHANCELLOR referred to *Davies* v. *Davies* (4); *Tate* v. *Williamson* (5); *Coutts* v. *Acworth* (6); and *Harrison* v. *Guest* (7).]

Mr. *Rastrick* was necessarily made a party in order to get at the real facts of the case, but, independently of the necessity of getting discovery from him, there was ample justification from his conduct in making him a party, and in asking that he might be ordered to pay the costs of the suit in the event of *Loader's* estate being insufficient to pay them. The deeds must be considered fraudulent as far as *Loader* was concerned, and Mr. *Rastrick* not only acted as his solicitor throughout, but defended the suit as Mrs. *Loader's* solicitor. He has consequently made himself a party to the fraud, and is liable to pay the costs: *Beadles* v. *Burch* (8); *Bowles* v.

(1) 14 Ves. 273.
(2) 4th Ed. p. 556.
(3) 4 Giff. 1.
(4) Ibid 417.
(5) Law Rep. 2 Ch. 55.
(6) Ibid 8 Eq. 558.
(7) 8 H. L. C. 481.
(8) 10 Sim. 332.

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Stewart (1); *Prideaux* v. *Lonsdale* (2); *Huguenin* v. *Baseley* (3) is also an authority on this point.

Mr. *Russell Roberts*, for Mr. *Woodward*, who had been appointed by the Plaintiff a trustee in the place of *Loader*, submitted his rights to the Court, and asked for his costs.

Mr. *Cotton*, Q.C., and Mr. *Charles Browne*, for the Defendant *Sarah Loader*, contended that the deeds were prepared at the express desire of the Plaintiff, and that the nature or effect of them was clearly and fully explained to her, and she quite understood what she was about.

They referred to *Berdoe* v. *Dawson* (4).

Mr. *Higgins*, Q.C., and Mr. *E. S. Ford*, for the Defendant *Rastrick*:—

There is no case to be found like the present, in which a solicitor has been made a party to a suit for the purpose of being made to pay the costs; and on the other hand, there are many cases like the present in which the same relief might have been asked against the solicitor who prepared the documents which were impeached. Such cases were *Clark* v. *Malpas* (5), *Harrison* v. *Guest* (6), *Gibbs* v. *Daniel* (7), and *Turner* v. *Collins* (8).

There are only three grounds on which a solicitor has been made to pay costs: first, where he is a trustee; secondly, where he has been guilty of actual fraud; and thirdly, where there has been such gross negligence as amounts to fraud. In *Huguenin* v. *Baseley* costs were ordered against the solicitor on the express ground that he had taken an advantage by the transaction. In *Beadles* v. *Burch* (9) the solicitor had been an active participator in a fraud; *Lyon* v. *Home* (10) was a case of a solicitor being a trustee and an active participator in the frauds; and in *Le Texier* v. *Margravine of Anspach* (11), and *Chapman* v. *Chapman* (12), where none of

(1) 1 Sch. & Lef. 209, 227.
(2) 4 Giff. 159; 1 D. J. & S. 433.
(3) 14 Ves. 273.
(4) 34 Beav. 608. 4 Jur. N.S. 257
(5) 31 Ibid 80. 8 Jur. N.S. 734,
(6) 8 H. L. C. 481.
(7) 4 Giff. 1.
(8) Law Rep. 7 Ch. 329.
(9) 10 Sim. 332.
(10) Law Rep. 6 Eq. 655.
(11) 15 Ves. 159.
(12) Law Rep. 9 Eq. 276.

(2 S.C. 9 Jur. N.S. 488, 507

these things occurred, the bill was dismissed with costs against the solicitor; and it may be questioned whether the older cases did not go further than would now be considered proper. At all events, it is now certain that mere want of caution, which is the only case attempted to be proved here, is not a sufficient ground for making a solicitor pay costs: *Tylee* v. *Webb* (1); *Marshall* v. *Sladden* (2). And he cannot be made a party merely for the purpose of asking costs against him: *Attwood* v. *Small* (3).

Moreover, the ground on which costs are asked against Mr. *Rastrick* is fraud, and this not having been sustained, they cannot be asked on any other ground, and the bill must necessarily be dismissed as against him with costs: *Hickson* v. *Lombard* (4); *Wilde* v. *Gibson* (5); *Archbold* v. *Commissioners of Charitable Donations and Bequests for Ireland* (6); *Fenwick* v. *Reed* (7). If the allegations of fraud are struck out, the bill is demurrable.

Mr. *Glasse* was only called upon to reply on the question of making Mr. *Rastrick* pay the costs:—

It was necessary to make Mr. *Rastrick* a party to obtain discovery, but he might have demurred unless he had been asked to pay the costs.

It is plain on the authorities, which begin from the earliest times, that a solicitor may be called upon to make discovery and pay the costs of a suit. *Chapman* v. *Chapman* (8) does not affect the case. It was an attempt to turn an action for negligence into a suit in equity. The case is distinctly within *Huguenin* v. *Baseley* (9), in which Lord *Eldon* followed the principle laid down by Chief Justice *Wilmot*, in *Bridgman* v. *Green* (10). In *Prideaux* v. *Lonsdale* (11) Vice-Chancellor *Stuart* had made a law stationer pay the costs, and though the Lords Justices thought the circumstances did not justify that decree, they did not dispute the jurisdiction.

(1) 14 Beav. 14.
(2) 7 Hare, 428.
(3) 6 Cl. & F. 232, 353, 357.
(4) Law Rep. 1 H. L. 324.
(5) 1 H. L. C. 605.
(6) 2 Ibid. 440.
(7) 1 Mer. 125.
(8) Law Rep. 9 Eq. 276.
(9) 14 Ves. 273.
(10) 2 Ves. Sen. 627; Wilmot's Notes, 58.
(11) 4 Giff. 159; 1 D. J. & S. 433.

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BAKER v. LOADER.

SIR R. MALINS, V.C., after discussing the facts of the case as bearing on the relief asked against *Loader's* estate, continued:—

This is the strongest case of undue influence and overreaching I have ever seen. The instruments must be set aside, with costs against *Loader's* estate. As his executrix did not admit assets, there must be the usual decree for the administration of his estate to ascertain what there is to answer the Plaintiff's demands, and also a general account.

The only remaining question is as to the costs asked against Mr. *Rastrick*, and whatever may be the result as to that, I cannot help regretting, on the whole, that Mr. *Rastrick* was made a party to the suit. The addition of his name as a Defendant greatly embittered the litigation, protracted it, and added to its expense. Mr. *Glasse* says, and probably with reason, that the mode in which the suit was defended rendered it necessary to make him a party, and I am bound to say that I entirely disapprove of the manner in which the Plaintiff's demands were resisted under his advice. I have made such observations as were necessary with regard to his conduct in the preparation of the instruments, and though I have acquitted him of all mean and improper motives, I cannot but accuse him of a great want of the discretion and judgment which ought to belong to a solicitor in conducting such transactions. And there is also his conduct in the suit, and whether it was his fault or that of his *London* agents, I entirely disapprove both of his defending the suit at all as solicitor, and of the manner in which he defended it.

Now, as to his costs, his counsel have argued that he was improperly made a party to the suit, and that, being improperly made a party, the bill must be dismissed against him with costs. I have expressed my regret that he was made a party, because he was not strictly a necessary party; but it was open to the Plaintiff to make him a party if she thought fit. Then the question is, whether the Plaintiff was warranted in making him a party for the purpose of asking costs against him, or for discovery on account of his having misconducted himself and misconceived his duty in the preparation of the documents.

It has been argued that the cases which made a solicitor liable for costs under such circumstances are no longer law, and that where a solicitor who has been engaged in the preparation of improper deeds

is made a party to a suit to set them aside, the bill must necessarily be dismissed with costs against him. That argument I entirely dissent from. There is no such rule. It depends upon the circumstances of each case whether a solicitor is properly made a party, or whether the Court will make him pay costs, or give him costs, or make him pay his own costs.

The authorities are clear, and most of them were cited by Mr. *Glasse* in his opening. The law is well stated in Lord *Redesdale* on Pleading (1), and the great authority of Lord *Eldon* clearly supports the same view in the passage in *Huguenin* v. *Baseley* (2), where he adverts to the principle as established by Chief Justice *Wilmot* in *Bridgman* v. *Green* (3), and the same principle is laid down by Vice-Chancellor *Shadwell* in *Beadles* v. *Burch* (4).

I need not go through all the numerous cases cited on the subject, but will take one of the most remarkable, *Harvey* v. *Mount* (5), which is not without analogy to the present. That was a case where a younger sister had executed a voluntary irrevocable deed, by which she became entirely dependent for support upon her elder sister and the elder sister's intended husband. A solicitor who had acted for both parties was made a party to the suit, and was charged with improper conduct in the preparation of the settlement. Though the Court exonerated him from culpability, he was ordered to bear his own costs because he had not acted with sufficient prudence in the matter, and on the ground that he had not done all that he ought to have done as acting for both parties.

The general principle is therefore clear, that if the case warrants it a solicitor may be ordered to pay costs or be left to pay his own. It is contended, however, that this principle was put an end to by *Marshall* v. *Sladden* (6), before Vice-Chancellor *Wigram*, in which *Harvey* v. *Mount* was cited. I have read that case, and can find nothing to shew disapproval of the doctrine laid down in *Harvey* v. *Mount*, and for my part I most heartily approve of it and concur in it.

(1) 4th Ed. p. 556.
(2) 14 Ves. 273.
(3) 2 Ves. Sen. 627; Wilmot's Notes, 58.
(4) 10 Sim. 332.
(5) 8 Beav. 439.
(6) 7 Hare, 428.

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On the same principle, in *Prideaux* v. *Lonsdale* (1), where a settlement was set aside on the ground of its being a fraud on the inchoate marital rights of a husband, the person at whose suggestion the settlement was made, and who retained it and concealed it from the husband, and afterwards resisted a decree to set it aside, though he took no benefit under it, was ordered, with the other parties, to pay the costs. Therefore, looking at every case that has occurred, I find no sanction for the doctrine that the rules of the Court have been in the slightest degree relaxed which throw upon a solicitor, in a proper case, the obligation to pay the costs of litigation occasioned by deeds improperly prepared by him and executed under his advice.

In the present case I have had some doubt on account of the nature of the charges made against Mr. *Rastrick* in the bill, and particularly on account of the statement, which turns out to be incorrect, that *Willis* was through his instrumentality employed in the business, and I think that if any costs have been incurred through that statement they ought to be allowed to Mr. *Rastrick*. I have also had considerable doubt whether one or two statements in the bill, which would rather lead to the inference that he had corrupt motives in view, which I am satisfied he had not, do not prevent me from ordering him to pay the costs; but, considering the very extraordinary nature of the deeds, and their wholly unjustifiable character, and above all, that which I think turns the scale against him, that when these deeds were challenged, which, in my opinion, are so gross and improper that no effort ought to have been made to sustain them, Mr. *Rastrick* having been the solicitor of the poor old woman who had been misled into executing them, himself became the active instrument in defending them, and, as the solicitor of *Loader's* family, set up claims on their behalf which could only result in their possessing Mrs. *Baker's* property and leaving her a pauper, I think he ought to be made to bear the costs of the suit. The members of the profession cannot too distinctly understand, that they are not, because poor misguided people tell them to prepare deeds depriving themselves of their property, and by which they enter into arrangements which no reasonable man can sanction, to undertake such business; and

(1) 4 Giff. 159; 1 D. J. & S. 433.

that if they do enter into such transactions, they will be in danger of being required to relieve from costs the parties who have had costs thrown upon them by the preparation of such deeds, and that, if brought before the Court to explain their conduct, they will never get the costs of the explanation.

That Mr. *Rastrick* ought to bear his own costs is beyond all possibility of doubt; and having defended the suit, as it appears, with the clear knowledge that the costs could never be paid by *Loader's* estate, the additional impropriety of his conduct is, in my opinion, so great, that upon the whole I have come to the conclusion that he must pay the whole costs of the suit if *Loader's* estate cannot do so.

The costs of *Woodward*, the trustee, will be paid by the Plaintiff and added to her own against *Loader's* estate.

Solicitors: Messrs. *Keighley & Gething;* Messrs. *Rowley, Page, & Rowley.*

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1873

March 11, 12, 13, 14.

WILSON *v.* LLOYD.

[1870 W. 162.]

Principal and Surety—Joint and Several Bonds—Covenant of Indemnity—Discharge of Surety by variation of Contract with Principal.

In 1869, *A.* retired from a partnership which had been carried on between *A.*, *B.*, and *C.*, *B.* purchasing *A.*'s share in the business, and covenanting to indemnify him against all partnership debts and liabilities. The liabilities then existing included two bonds given to secure moneys advanced to the firm for partnership purposes, on which *A.* and *B.* had become jointly and severally liable to *D.*

In August, 1871, *B.* and *C.* made an arrangement with their creditors under the *Bankruptcy Act*, 1869. Resolutions were passed by the creditors, including *D.*, who proved for his debt, to accept a composition of 15*s.* 3*d.* in the pound, payable by instalments extending over two years; and an inspectorship deed releasing *B.* and *C.*, and reserving to the creditors their rights against any surety or person other than *B.* and *C.*, liable in respect of the debts thereby released, was executed by the creditors, including *D.*:—

Held, that the effect of the composition under which time had been given to *B.* and *C.*, as principal debtors, without the consent of *A.*, was to discharge *A.*

Where resolutions formally agreed to by creditors under sects. 125, 126 of the *Bankruptcy Act*, 1869, contain no reservation of any rights against co-debtors or sureties, the reservation of such rights by a subsequent deed of composition is inoperative.

PRIOR to 1858, the Plaintiff and *John Littlewood* carried on the business of calico printers in *Lancashire*, under the firm of *Littlewood, Wilson, & Co.*, upon premises where the business had formerly been carried on by *James Simpson*. In 1858 Plaintiff and *Littlewood* admitted the Defendant *Lloyd* into partnership, and the business was carried on as the *Foxhill Bank Printing Company* until April, 1862, when *Littlewood* retired, and his share in the business was assigned to Plaintiff and *Lloyd*, who released him from all debts and liabilities. The partnership was thenceforward, subject to a variation in its terms made in 1867, carried on by Plaintiff and *Lloyd* until 1869; the Defendant *Chatteris* was taken into the firm, and shortly afterwards the Plaintiff retired.

In August, 1859, the firm, then consisting of *Littlewood*, Plaintiff, and *Lloyd*, executed a bond to *James Simpson* the younger, the

Defendant *William Harvey*, and *John Kay* (trustees of the will of *James Simpson* the elder, their predecessor in the business), for repayment of the principal sum of £18,000, with interest at 6 per cent., representing the balance due in respect of money lent to the firm for the purpose of carrying on the business.

In April, 1866, the Plaintiff and *Lloyd*, being indebted as co-partners to *William Harvey* and *John Kay*, on a joint account, in the sum of £15,000, in addition to £4000 remaining due upon the bond of August, 1859, executed a bond to *William Harvey* and *John Kay* for payment of £15,000, with interest at 5 per cent. In 1867 the two bonds, and the principal and interest thereby secured and then remaining due thereon, became vested by assignment in the Defendants *William Harvey* (since deceased), *James Harvey*, *John Tysoe*, and *Joseph Harvey* (hereinafter called Messrs. *Harvey*).

In February, 1869, the Plaintiff and *Lloyd* admitted the Defendant *Chatteris* into partnership upon certain terms, in which it was stipulated that the whole of the capital and stock-in-trade of the partnership should belong to the Plaintiff and *Lloyd* in the proportions therein mentioned.

In August, 1869, it was agreed between the partners that the partnership should be dissolved, and that *Lloyd* should purchase the Plaintiff's share, right, and interest in the business for the sum of £7900, taking upon himself the payment of all partnership debts and liabilities, and in the meantime should indemnify *Wilson* from all such debts, obligations, contracts, and agreements. For giving effect to this agreement a deed of dissolution, dated the 10th of August, 1869, was executed, by which the Plaintiff assigned his share to *Lloyd* for the considerations above stated, and *Lloyd* covenanted with Plaintiff, his executors and administrators, that he, *Lloyd*, his executors, administrators, and assigns, "would at all times thereafter effectually keep indemnified the Plaintiff, his heirs, executors, and administrators, and his and their estate and effects, from and against all the debts and sums of money due and owing in respect of the co-partnership, and all the obligations, contracts, and engagements and agreements of the co-partnership then unperformed by the parties to the now stating indenture, or to which they were liable as co-partners as aforesaid, unto or with any person or persons whomsoever on account of the co-partnership, and from

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all claims, costs, charges, damages, and expenses in respect thereof or arising therefrom, except only such debts, obligations, contracts, engagements, or agreements as might have been contracted or incurred on account of the co-partnership by the Plaintiff, but which had not been entered in the books thereof, all which, if any, were to be paid, met, and discharged as if the now stating indenture had not been made (but no such debts, obligations, contracts, engagements, or agreements had been contracted by the Plaintiff); and in consideration of the premises the Plaintiff and the Defendants *Lloyd* and *Chatteris* entered into such mutual general release as therein mentioned on account of the co-partnership so thereby dissolved, or of any covenant or provision contained in the therein-before mentioned agreement or articles of partnership, or either of them, or any other mortgage or thing whatsoever in any manner relating to the same . . . . , except in respect of and without prejudice to the covenants and agreements in the now stating indenture contained expressly or by implication.

Messrs. *Harvey* had notice of this deed.

Lloyd and *Chatteris* continued from this time to carry on the partnership business until the arrangement with their creditors in August, 1871, hereinafter stated; and the interest due upon the bond debt was from time to time paid to Messrs. *Harvey*, the obligees, up to October, 1870. In May, 1870, *Wilson* applied to *Lloyd* requiring him to pay or to sufficiently indemnify him (*Wilson*) against all principal and interest due and payable under the bonds, and also to pay or indemnify him against all other partnership debts and obligations. *Lloyd* replied by his solicitors that he never undertook to pay the bond debts and other liabilities of the partnership at any definite time, or to provide any specific indemnity against them other than the covenant contained in the deed of dissolution, which Plaintiff agreed to accept.

On the 25th of June, 1870, Plaintiff filed his bill against *Lloyd* and *Chatteris* and Messrs. *Harvey*, alleging that, having regard to the arrangement made between Plaintiff and *Lloyd*, *Lloyd* was in the position of principal, and Plaintiff in the position merely of surety for the payment and performance of the bond debts and other debts and obligations; and that it was most unjust that Plaintiff should "any longer have such a cloud as the aforesaid

debts and liabilities hanging over him." The bill also charged that, upon the true construction of the covenant entered into by *Lloyd* and contained in the deed of dissolution, it was his duty to relieve Plaintiff from all liability upon the bonds and other partnership debts, either by forthwith paying them off, or by giving Plaintiff an indemnity against all the partnership debts and obligations; and also that the *Harveys*, who had full notice of the dissolution of partnership and the covenant entered into by *Lloyd*, were bound either to enforce payment by *Lloyd* and *Chatteris* of the bond debts, or to release Plaintiff from all liability in respect thereof. The bill prayed specific performance of the covenant by *Lloyd* contained in the deed of dissolution, and payment to the obligees (the *Harveys*) of principal and interest due upon the bonds, and specific performance of all other partnership contracts, &c.; the appointment of a receiver, and partnership accounts.

Subsequently to the filing of the original bill, and before the suit came on for hearing, *Lloyd* and *Chatteris*, being unable to pay their debts, filed on the 1st of August, 1871, a petition in the *Manchester* County Court under sects. 125, 126 of the *Bankruptcy Act*, 1869, for liquidation by arrangement with their creditors. The Defendants the *Harveys* proved under such liquidation for £19,335 16*s.* 11*d.*, being the amount of principal and interest then due or claimed by them under the bonds of August, 1859, and April, 1866. Meetings of the creditors, at which Messrs. *Harvey* were present, were held in the manner prescribed by the *Bankruptcy Act*, 1869, and the rules and orders in pursuance thereof, and it was resolved that a composition of 15*s.* 3*d.* in the pound be accepted in satisfaction of the debts due to the creditors from *Lloyd* and *Chatteris*, payable by six equal instalments extending over twenty-four months. These resolutions were confirmed at a further general meeting of the creditors held on the 12th of September, 1871, by the statutory majority of the creditors then assembled, including Messrs. *Harvey*, and the resolutions were duly registered in accordance with the provisions of the *Bankruptcy Act*, 1869. They contained no reservation of rights against sureties, but they authorized the preparation of a deed with proper clauses to give effect to the resolutions. A deed dated the 12th of September, 1871, to which Messrs. *Harvey*, described as the trustees, were parties for the purpose of carrying out these

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resolutions, was prepared and executed by the creditors, by which (cl. 3), in consideration of the composition of 15*s.* 3*d.* in the pound, and subject to the provisions thereinafter contained, the creditors released the debtors (*Lloyd* and *Chatteris*) "from all the debts, claims, and sums of money now owing to the creditors respectively, and also from all actions, claims, and demands in respect thereof; but the said creditors do hereby respectively reserve to themselves (as in bankruptcy) their respective rights and remedies against any surety or sureties, or person or persons, other than the said debtors liable in respect of the said debts or sums of money hereby released."

In the event of the debtors making default in payment of any of the instalments, or in case the committee of inspection should consider that the business was not being carried on satisfactorily, power was given to them to enter upon the business premises and seize any property for the time being belonging to the debtors therein (subject to the rights of the trustees upon the partnership premises under their agreement), and also to collect the debts and assets, and on behalf of the debtors to execute an assignment vesting the property of the debtors in *Halliday*, the trustee. Upon the execution of such assignment it was provided that the creditors should take the same in full discharge of every debt due from and claim upon the debtors antecedent to the 2nd of August, 1871, except every claim of the trustees, Messrs. *Harvey*, in respect of an agreement of the 1st of December, 1867, and that the composition deed should be as full and effectual a release and discharge to the debtors as an unconditional order of discharge under an adjudication of bankruptcy. The deed (cl. 13) also contained a covenant by the trustees, Messrs. *Harvey*, to postpone the payment to them by the debtors of one-half of each of the instalments of the composition on their bond debt of £19,335 16*s.* 11*d.* until the expiration of twenty-four months from the 12th of September, 1871, or until the committee of inspection should exercise the powers given to them of entering upon and winding up the business.

The Plaintiff, who took no part whatever in the matter of the liquidation or of the resolutions, and without whose privity or concurrence the composition deed was executed by the Defendants,

charged by his further re-amended bill, filed the 9th of February, 1872, that under the circumstances he was absolutely released and discharged from all liability in respect of the bonds of August, 1859, and April, 1866, and from all principal moneys and interest. The further re-amended bill prayed a declaration to this effect, or, alternatively, that the Defendant *Lloyd* might be decreed to perform his covenant with the Plaintiff (entered into upon the dissolution of the partnership between them), and, pursuant thereto, to pay to Defendants Messrs. *Harvey* (the existing obligees of the bonds) the principal and interest remaining due upon the bonds, and also to perform all the other partnership engagements referred to in such covenant, or to cause Plaintiff to be effectually released from all such bond and other debts, contracts, engagements, and agreements.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

First: By the retirement of the Plaintiff from the firm in 1869 with a covenant of indemnity by *Lloyd*, the continuing partner, his liability upon the bond debts was changed from that of principal to surety; and the effect of the arrangement of August, 1871, by which (made without consent of or communication with Plaintiff) Messrs. *Harvey*, who were aware that the Plaintiff had retired from the firm, entered into a new contract with *Lloyd & Chatteris*, and gave time for payment of the reduced amount of debt, was to discharge the Plaintiff, the surety, from all liability in respect of the bond debts: *Oakeley* v. *Pasheller* (1); *Evans* v. *Drummond* (2); *Hart* v. *Alexander* (3).

Secondly: A new partnership having been formed which took over all the assets of the old partnership, with an undertaking to discharge all the debts of that firm, the obligees, who have dealt with the new firm as their debtors, and accepted their liability by having proved under and been parties to the composition deed made in 1871, have lost their right to sue the Plaintiff, who represents the old firm, and a complete novation has been effected: *Fleming's Case* (4); *In re Times Life Assurance Company* (5).

(1) 4 Cl. & F. 207.
(2) 4 Esp. 89.
(3) 7 Car. & P. 746.
(4) Law Rep. 6 Ch. 393.
(5) Law Rep. 5 Ch. 381.

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Thirdly: It will be contended that by clause 3 of the composition deed the obligors have expressly reserved their rights against the Plaintiff (as surety) in respect of the debts thereby released, but this reservation is inoperative, as after an actual release has been given to the principal debtor the surety will be discharged, and no right can be reserved against him: *Webb v. Hewitt* (1); *Oakeley* v. *Pasheller* (2); and any attempted reservation of rights by the subsequent deed cannot operate to avoid the effect of the prior resolutions.

Fourthly: As against *Lloyd* these bonds are clearly included in the covenant of indemnity contained in the deed of August, 1869; and although he has not been actually sued, the Plaintiff, at any time after the debt becomes due, may file a bill to compel the principal debtor to discharge the debt and perform his covenant to save him harmless: *Wooldridge* v. *Norris* (3); "it being unreasonable that a man should always have such a cloud hang over him": *Ranelaugh* v. *Hayes* (4).

Mr. *Fischer*, Q.C., and Mr. *Hemming*, for the Defendants *Lloyd* and *Chatteris*:—

The Plaintiff's bill is wrong in point of form, and demurrable, as it prays alternative relief against us upon inconsistent allegations, and we have claimed the benefit of the objection by our answer in the same way as if we had demurred. The bill alleges, and we do not dispute, that the Plaintiff is absolutely released and discharged from all liability in respect of the bond debts; and the fact that the other Defendants allege, or do not admit, that Plaintiff is so discharged does not entitle him to fall back against us for alternative relief in the shape of payment and indemnity: *Clark* v. *Lord Rivers* (5); *White* v. *Smale* (6). But in any case the Plaintiff is not entitled under the covenant of indemnity to call upon the covenantors to make a precautionary payment by way of preventing the risk of his being eventually damnified: *Antrobus* v. *Davidson* (7). The rights and liability of the parties with respect to the bonds are regulated by the deed of August, 1869, by which

(1) 3 K. & J. 438.
(2) 4 Cl. & F. 207.
(3) Law Rep. 6 Eq. 410.
(4) 1 Vern. 189.
(5) Law Rep. 5 Eq. 91.
(6) 22 Beav. 72.
(7) 3 Mer. 569.

Lloyd was not liable to pay or indemnify within any specified time; and Plaintiff, whose bill seeks immediate payment or indemnity, is not entitled to this variation of the agreement, or to ask the Court to put him in a better position than the covenant left him: *Johnson* v. *Mills* (1); *Flight* v. *Cook* (2). Against the Defendant *Chatteris* no relief is prayed; and as he was not a party to the agreement between *Lloyd* and *Wilson* the bill must be dismissed as against him with costs.

Mr. *Little*, Q.C., and Mr. *Oswald*, for the Defendants *Harvey, Tysoe, & Harvey*:—

We admit that after the dissolution of partnership in 1869, the Plaintiff, with respect to *Lloyd*, stood in the position of surety only, but his position of principal debtor to us remained unaltered. It is not sufficient for the Plaintiff to allege that we had notice of the transactions between himself and *Wilson*. Before he can be discharged from his liability to us he must shew that we assented to, as well as knew of, the change of position; and it has been held that a creditor who treats the new firm, or continuing partners, as his debtors, does not necessarily abandon his rights against the old firm or the retired partner, either at law or in equity, particularly in a case in which there is not only no evidence of any intention to abandon such claim and to adopt the individual responsibility of the continuing partner, but there is a total absence of any object or consideration for so doing: *Winter* v. *Innes* (3); *Heath* v. *Percival* (4); *Lodge* v. *Dicas* (5); *Thompson* v. *Percival* (6); *Hart* v. *Alexander* (7); *Bedford* v. *Deakin* (8); *Harris* v. *Farwell* (9). The Plaintiff relies upon *Oakeley* v. *Pasheller* (10), but there is a clear distinction, as that was not the case of a bill by one of two joint and several debtors claiming indemnity against the debt, but of administration of the assets of a deceased partner, where, "if the creditor lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone

(1) 1 Ves. Sen. 282.
(2) 2 Ibid. 620.
(3) 4 My. & Cr. 101.
(4) 1 P. Wms. 682.
(5) 3 B. & A. 611.
(6) 5 B. & Ad. 925.
(7) 2 M. & W. 484.
(8) 2 B. & A. 210.
(9) 15 Beav. 31.
(10) 4 Cl. & F. 207.

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were his debtors, in that case a Court of Equity will not assist the creditor in an attempt to resort to the assets of the deceased, and will hold those assets to have been discharged. *Oakeley* v. *Pasheller* (1) and *Brown* v. *Gordon* (2) may be referred to as illustrating this doctrine": *Lindley* on Partnership (3). And, again, the authority of *Oakeley* v. *Pasheller* is not to be extended so far as to discharge from liability the partner who retires with an indemnity, by reason of acts by the continuing partners within the scope of the original contract, and not amounting to a variation of it: *Oakford* v. *European and American Steam Shipping Company* (4). It is not sufficient for the Plaintiff, who seeks exoneration from his liability to us as obligee upon the bonds, to shew that we have proved against the estate of some other person in respect of that bond. He must shew some agreement on which he could plead accord and satisfaction in an action by us against him on the bond. But in this case there has been no satisfaction or extinguishment of the debt due upon the original bond. The composition deed under which additional security is taken, and the compounding debtors are released, does not affect the original liability of Plaintiff upon the bonds. A release contained in a composition deed did not, under the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), extend to co-debtors: *Andrew* v. *Macklin* (5); and it is submitted that the liability of Plaintiff would also, under the Act of 1869, remain unaffected even if the composition deed had not contained, as it does, a reservation of all rights against sureties: *Robson* on Bankruptcy (6). The question of novation has been raised at the bar, and cases of assurance companies have been cited which have nothing to do with the old doctrine of the civil law as laid down in Institutes, lib. iii. tit. xxix.; *Sandars'* Justinian (7): "That novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one; otherwise the former obligation will remain binding while the second is added to it, so that each contract will give rise to an obligation still in force." The intention

(1) 4 Cl. & F. 207.
(2) 16 Beav. 302.
(3) 3rd Ed. p. 462.
(4) 1 H. & M. 182.
(5) 6 B. & S. 201.
(6) Page 243.
(7) Page 485.

(5) 6 C. B. (N. S.) 609

to "novate" must be clearly established. Mere inference is not sufficient, and in this case no such intention has been, nor could be, shewn, as it is not conceivable that we should intend to give up the security of *Wilson*, who was perfectly solvent, for the sake of getting what we could out of an insolvent estate. As against Messrs. *Harvey*, the bill is therefore entirely misconceived, and should be dismissed with costs.

Mr. *Kay*, in reply.

SIR JAMES BACON, V.C.:—

The Plaintiff is the co-obligor in a joint and several bond to the Defendants Messrs. *Harvey, Tysoe, & Harvey*, and there can be no doubt as to the legal right of the obligees to sue each and either, or both, of the obligors, as they may think fit, upon that bond. The rights of the obligees can only be altered or qualified by acts of the obligees themselves, and the single question upon the record is whether the acts and conduct of the obligees have released the Plaintiff from his original obligation? It would be against every principle of law and of common sense and justice that it should be in the power of the obligors to limit in any degree the rights of the obligees; but it is perfectly competent to the obligees so to deal with the rights which they have acquired under the bond as to vary the obligation and liability of the obligors, and, as I have already said, the important, I might almost say the only, question is, whether that has taken place in this case. The bill, as originally filed, was for specific performance of an agreement contained in a deed made in August, 1869; and was a bill against *Lloyd*, who by that deed had covenanted to pay all the debts, including the bond debts in question, and to indemnify the Plaintiff, and against *Chatteris*, who had an interest as partner in that property which the Plaintiff *Wilson* had surrendered upon retiring from the partnership, and which was, without being expressed, obviously among the means which *Lloyd* would have of satisfying his covenant with *Wilson*. *Chatteris* was let into possession as a partner, and therefore, in my opinion, he was properly a party to the original bill. The obligees in the bond were made parties to that bill, but they did not demur to it. Why they were made parties does not distinctly appear, but they were made parties, and not only did not

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demur, but in their answer (par. 14)—and this, in my opinion, has a direct bearing on the questions to be considered—they say, answering no doubt an interrogatory, and answering the bill, in which the deed of 1869 with all its provisions was distinctly stated, "We have heard, and therefore we admit, that we have had notice of the indenture of dissolution of partnership of August, 1869, in the bill mentioned, and that the Defendant *Lloyd* has, as between himself and the Plaintiff, taken upon himself the sole liability under the said bond, but we submit that that fact does not affect our rights and remedies against the Plaintiff." From the period, therefore, of filing that answer it is not too much to say that Messrs. *Harvey* were fixed with, and have confessed that they had, full knowledge of all the provisions of the deed; not that they were bound by it, but that they had full notice of it, and therefore knew that the joint property of the partners had been sold and surrendered for a price to the new firm consisting of *Lloyd* and *Chatteris*, and that one of the terms of the sale was that *Wilson* should be indemnified by *Lloyd*, not by *Chatteris*, against all the existing debts, of which *Harveys'* was one. Before any further important step was taken in the suit, *Lloyd* and *Chatteris* failed in trade and called a meeting of their creditors under sects. 125 and 126 of the *Bankruptcy Act*, 1869. Meetings were held, at which Messrs. *Harvey* took an active part. They had a direct interest as creditors for a sum exceeding £19,000 (which I assume appeared in that statement of debts which, under the provisions of the Act, a debtor seeking to make a composition with his creditors must file and lay before them at the first meeting); and that they were there in the character of creditors is abundantly clear upon the evidence. Then what took place was, that the *Harveys* agreed to the terms of the resolution after they had stated in their answer that their right against the Plaintiff was not to be affected by the deed of 1869. They agreed to accept the composition payable in the terms there mentioned, and they agreed further to postpone the half of that which they would be entitled to until the period mentioned in the resolution. The question is, therefore, whether, in consequence of what they so did, the Plaintiff is released from his obligation. Now, as I read it, *Oakeley* v. *Pasheller* (1) is conclusive upon this

(1) 4 Cl. & F. 207.

case. The Plaintiff there insisted that he was entitled to be discharged from his original obligation because of the manner in which the creditors had dealt with the co-debtors. It arose upon joint and several bonds, so that there were the same features in that and in this case; and the ultimate decision was, that the indulgence granted by the creditor for the payment of the bond in 1817 without the consent of the co-obligor's executor, had the effect of discharging his estate. The case came on, in the first instance, before the Master of the Rolls, and after deciding the first point, which is immaterial, he says (1): "But in 1817 Sir *C. Oakeley* enters into an agreement with the two partners, who had become, as between them and the executors of *P. C. Sherard*, the principal debtors on the bonds, and he agrees, as appears from the letters and accounts, to give them three years' time for payment of the demand. Indeed, he could not within the three years proceed against the principal debtors or the surety in respect of this demand; and if he could not proceed against either the surety is relieved, and for this reason, because whatever he paid he has a right to call on the principal debtor to repay him what he so advanced. But if there be a delay for three years, he may be prejudiced by such delay, because in the meantime the solvent principal debtor may become insolvent, and so, by the act of the creditor, the surety would have lost his remedy against the principal debtor. The time granted to the principal debtor in this case in 1817 discharged the estate of *Sherard*." From this passage it is clear that that point, which is identical with the point raised here, was before the Court then, and was one of the grounds upon which the judgment was pronounced, which was adopted by the subsequent decision in the House of Lords. Here the time is not three years, it is true, but the length of time makes no kind of difference. As to one half of it, the time is mentioned in the resolutions. As to the other half, it is for the period of the successive instalments by which the composition was payable, and during all that time all those injuries and all those inconveniences to which the person whom I call the surety would be exposed would exist. He had no right to that which he asserted by the bill for specific performance. He had no right to sue for any-

(1) 4 Cl. & F. 224.

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thing if he had not paid anything; and for the time which had been granted he was exposed to all the inconveniences and loss which might arise by what is called the principal debtor becoming insolvent. Between the two cases, therefore, there is no substantial difference. The decree of Sir *John Leach* was affirmed by the Lord Chancellor, and the case then came before the House of Lords. Lord *Lyndhurst*, in giving judgment, said (1): "Now the principle of law is, that where a creditor gives time to the principal debtor, there being a surety to secure payment of the debt, and does so without consent of or communication with the surety, he discharges the surety from liability, as he thereby places him in a new situation, and exposes him to risk and contingency to which he would not otherwise be liable." Therefore Lord *Lyndhurst* adopts in his judgment, as the Master of the Rolls had adopted in his judgment, the fact that as between the two original debtors one became principal and the other surety under the deed of August, 1869; and the principle there laid down by the highest authority seems to be directly applicable to this case to its minutest facts. With knowledge that, as between themselves, *Wilson* and *Lloyd* had been constituted principal and surety, and with knowledge of the covenant of indemnity contained in the deed, these creditors attend the meeting and enter into a bargain, not with *Lloyd* and *Chatteris* alone, but with the other creditors who are parties to the composition, that that new debt—as I may very properly call it—the payment of which the two debtors, *Lloyd* and *Chatteris*, take upon themselves, shall be liquidated and satisfied by means of the composition then agreed to. The resolutions are clear and distinct beyond the possibility of a doubt, and contain no reservation of any rights, though there is a reservation in the deed. But even if I were to give more effect to that reservation than I feel inclined to do, it would be still to be observed that the resolutions were binding before the deed was executed. They were capable, no doubt, under the statute, of any reasonable modification; but the modification must be agreed to at the meeting of the creditors, and it must not depart from the original stipulation, or it must not depart from it to the prejudice of any one. In the deed there is a reservation, and so in *Oakeley* v. *Pasheller* (2)

(1) 4 Cl. & F. 233. (2) 4 Cl. & F. 207.

there was a very plain reservation in the year 1823 of the rights then existing. But there the surety had been released by the arrangements of 1817, and here he had been released by the resolutions. Now, what was the situation of the parties after those resolutions were come to? It would be in vain to pursue the suit for specific performance against men who were released from their debt, as they were by the statute. It would be impossible for the Plaintiff to sue either *Lloyd* or *Chatteris*; he could not sue *Chatteris* at law, unquestionably; he could take no steps; and if he had sued for the non-performance of the covenant, or to get specific performance of it (which would be impossible for the reason I have given), the answer would be, "As far as I am concerned, you are indemnified; I have paid by contract with the creditor; I have satisfied him; he has no demand against me; it is impossible for him to recover anything against me." That is the view which *Lloyd* and *Chatteris* also took. They say that they are acquitted and discharged, as in my opinion they are wholly acquitted and discharged.

Then what is the situation of the Plaintiff? By the act of Messrs. *Harvey* and the others, with the full knowledge of his situation, not bound in the slightest degree, but competent to any extent, they thought fit to enter into a new engagement—new in its substance and effect, and new in its nature—which provides for the payment of less than the whole of that debt, and gives time for the payment of that diminished amount. Can that be done to the prejudice of the Plaintiff with this knowledge? I apprehend not. The *Harveys* themselves make it impossible that the Plaintiff should have any rights against *Lloyd*. They have made a new and distinct contract, by which the debt (for the debt was one though the remedies were several) was changed from a debt which was due from *A.* and *B.* jointly and severally, to a new debt from *B.* and *C.*—new in amount, new in the nature of its constitution, new as to the remedy for recovering it. If *Oakeley* v. *Pasheller* (1) is right, as I have no reason to doubt, it entirely covers this case. Time has been given, and the attempt to reserve the right against sureties came too late, and fails for the reasons which I have pointed out. Time has been given, and by that arrangement the Plaintiff is

(1) 4 Cl. & F. 207.

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deprived of the rights which he would have had. His pending suit, to which the *Harveys* were parties and had not demurred, is almost put an end to—made fruitless; and any right that he might have had to relief became ineffectual. The very means which *Lloyd* and *Chatteris* had of paying the debt have been vested in a trustee under the bankruptcy, and absorbed for the purpose of satisfying this composition. Without, therefore, going into any of the other cases, *Oakeley* v. *Pasheller* (1) decides the whole of this case. But that is not all that has been argued, and I think argued with a force which has not been answered—viz., that, by the application, not of any new law, but of a very old law, it is shewn that by the bargain which was then made by the creditor (the obligee) with one person who was the obligor, and with another who was under no liability whatever, a novation (if I am obliged to use that word) has been completely effected. The Institutes—the oldest law upon the subject—have been referred to, and they say that two things must concur: there must be the *animus novandi*, and the substitution of some other thing for that original obligation out of which the debt arose. I find both these ingredients here most distinctly. I find the *animus novandi* proved beyond all possibility of question; although that is a thing which is not to be proved as a fact, but is an inference from the facts which are proved; and I find the fact to be that, when the joint and several debtor, *Lloyd*, failed in his business, and called his creditors together, and asked them to consider how he could best satisfy their demands, they agreed that they would take the new security—these bills of exchange, and the security afterwards of the deed—instead of, and in substitution for, the debt which was then due to them. The cases referred to, *In re Times Life Assurance Company* (2), and *Fleming's Case* (3), contain a principle not in the slightest degree new, but perfectly just, and reconcilable with all the cases that have been referred to, and which is applicable distinctly to the facts of the case. Messrs. *Harvey* had no right or remedy against *Chatteris*, but by *Chatteris'* contract. They accept *Chatteris'* liability as a security for their debt; they have that inducement; that is the consideration upon which they agree to become parties to that

(1) 4 Cl. & F. 207 (2) Law Rep. 5 Ch. 381.
(3) Law Rep. 6 Ch. 393.

deed of composition. That deed of composition, containing as it did an agreement to take less than the whole amount of the debt which was due to them, providing that a less amount should be secured in a certain form, and giving time for the payment of the new debt, made a totally new contract between the parties, changed their situation, their rights and interests, entirely, and the case therefore falls, as I think, not only within the cases on the subject of novation, but most clearly and distinctly within *Oakeley* v. *Pasheller* (1), because it was a giving time, which seems to have been the main ground on which that decision was rested, though it rests on higher principles than the merely giving time. The substance of it is, that the rights and interests of the party who claims to have been released have been in effect greatly prejudiced and injured by what was then done by the creditor; and after such knowledge as the Defendants *Harvey* say that they possessed, and their active participation in the composition proceedings, to say that they still retain their rights against the Plaintiff, would in my opinion be directly contrary to the law as I find it, and, as I am convinced, contrary to the justice of the case. The Plaintiff is entitled, therefore, to a declaration, as prayed by his bill, that he is absolutely discharged from all liability in respect of the said bonds of August, 1859, and April, 1866, and from all principal moneys and interest due and owing thereunder. With regard to the suggestion that inconsistent reliefs are asked, they are inconsistent only, as an alternative is always inconsistent, with the thing first asked; but they both come from the same source, are directed to the same subject, and apply themselves to the same parties; and although if the bill were dismissed as to the first paragraph, there might be some title to relief on the second, yet they are not so inconsistent as to shift the Plaintiff's rights, or to destroy them entirely.

As to the costs of this suit, the Plaintiff's costs must be paid by Messrs. *Harvey*. They might have demurred to the bill, but did not choose to do so. They have tried to defend their case upon the further re-amended bill, and having, for the reasons I have stated, failed, they must pay the costs of this suit. I can give no costs to *Chatteris* or to *Lloyd*, because, although no direct relief is

(1) 4 Cl. & F. 207.

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asked against *Chatteris*, he is rightly a party to the first bill, and he did not demur or make any objection that I know of. On the second bill he was, I think, so interested that the Plaintiff had a right to bring him here as a party, and I do not think he is under any obligation to pay any costs in respect of having brought him here. As to those costs, therefore, I make no order, but I must order Messrs. *Harvey* to pay Plaintiff's costs of the suit.

Solicitors: Mr. *Dommett*, for Messrs. *Slater & Poole, Manchester;* Messrs. *Chester, Urquhart, & Co.*, for Messrs. *Chapman, Roberts, & Beck, Manchester;* Messrs. *Johnson & Weatheralls*, for Messrs. *Hulme, Foyster, & Foyster, Manchester.*

V.-C. B. 1873 *March* 6.

VENABLES *v.* SCHWEITZER.

[1872 V. 11.]

Practice—Evidence—Privilege.

2 Ch. D. 577. 9 Ch. D. 168

In the prosecution before the Chief Clerk of an inquiry directed by an administration decree, any person able to give information relating to the assets may be summoned by subpœna, and is bound to attend before a Special Examiner, and to answer all questions properly put to him by the receiver having the conduct of the decree; but the witness so summoned may decline to answer any questions tending to shew his liability in a pending action commenced by the receiver against him.

MOTION on behalf of the Plaintiff that *J. T. Dobson*, a witness sworn and examined in this cause on behalf of the Plaintiff on the 24th of February, before a Special Examiner, might be ordered to attend at his own expense before the Examiner to be further examined as a witness for the Plaintiff; and that the said *J. T. Dobson* might be ordered there and then to answer the questions which he demurred to, or objected to answer, with reference to a bill of exchange drawn by the intestate upon, and accepted by, him (witness), and produced at such examination.

The suit was a creditor's suit for the administration of the estate of *Theodore Edward Schweitzer*, who died intestate on the 22nd of January, 1872, and by the decree the usual accounts and inquiries as to the outstanding personal estate of the intestate were

directed. Mrs. *Schweitzer*, the widow and administratrix of the intestate, had left the country, and a receiver was appointed. Among other securities found by the receiver among the intestate's papers were certain bills of exchange drawn or accepted by *Dobson*. Actions upon these bills of exchange had been commenced by the receiver against *Dobson* in the name of Mrs. *Schweitzer*.

In the course of the proceedings before the Chief Clerk in Chambers, a Special Examiner was appointed, and a subpœna was issued for the attendance of *Dobson* for examination on behalf of Plaintiff.

Dobson attended before the Special Examiner, but refused to answer any questions with reference to the bills of exchange upon which he was being interrogated, on the ground that he was being sued thereon at law at the instance of the receiver. The Special Examiner expressed his opinion that the witness was not bound to answer the questions, and adjourned the examination to enable the parties to apply to the Court, certifying that the witness, "being duly sworn, was interrogated with reference to a bill of exchange accepted by him, but refused to answer any questions in reference to the said bill on the ground that he was being sued thereon at law at the instance of the receiver, in the name of the administratrix of the intestate, who was the drawer of the bill."

Mr. *J. W. Chitty*, in support of the motion, referred to 15 & 16 Vict. c. 80, ss. 30, 31; *Morgan's* Chan. Ord. (1); enabling the Chief Clerk to summon witnesses, and rendering parties and witnesses so summoned liable to process of contempt in case of disobedience; and to 15 & 16 Vict. c. 86, ss. 40, 41, enabling any party in a cause, by writ of subpœna, to require the attendance of any witness before a Special Examiner, and assimilating the practice as to evidence subsequent to the hearing (as in this case) to that of evidence taken with a view to the hearing; this provision being left unaltered by the Order of the 5th of February, 1861, r. 15; *Morgan's* Chan. Ord. (2). As to the privilege claimed by the witness, he could not refuse to answer a question either at law or in equity on the ground that the questions related to the subject-matter of a pending litigation in which he happened to be interested.

(1) 4th Ed. p. 152. (2) 4th Ed. p. 625.

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Mr. *Swanston*, Q.C., and Mr. *Grosvenor Woods*, for *Dobson*, opposed the motion:—

The issue of a subpœna by the receiver was irregular and improper. Under the common inquiry as to assets in an administration suit, the receiver has no such right as is here claimed of summoning any persons he pleases and subjecting them to a roving examination; the person to be examined under 15 & 16 Vict. c. 80, s. 30, being entitled to notice of the points on which he is to be examined; *Morgan's* Chan. Ord. (1). Such a power might possibly be asserted under the Bankruptcy or Winding-up Acts; but even in the analogous case of an examination in Chambers by the official liquidator, under sect. 115 of the *Companies Act*, 1862, of "any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," a summons must first be taken out in Chambers; and it is not the proper course for the official liquidator, without any communication whatever with the Judge, to issue a subpœna: *In re English Joint Stock Bank* (2); and the examination must be limited to the matters specified in the affidavit: *In re Brampton and Longtown Railway Company* (3); *In re Breech-Loading Armoury Company* (4). But, assuming that the witness has been properly summoned, he cannot, either upon practice or principle, be compelled to answer questions put to him by a hostile litigant in another Court in reference to the subject-matter of such litigation, as the evidence, if allowed, may be used against him in the common law proceedings.

Mr. *Chitty*, in reply:—

As to the alleged irregularity, it is too late for the witness to take the objection, as he should have done so, if at all, before he was sworn. But we say there has been no irregularity. The receiver is seeking to obtain evidence, and not discovery, and, in pursuing the inquiry directed by the decree for the purpose of ascertaining what the assets of the intestate consisted of, is entitled to issue a subpœna to compel the attendance of this witness, who can give information as to these bills of exchange, which formed

(1) 4th Ed. pp. 152, 555.
(2) Law Rep. 3 Eq. 203, 209.
(3) Law Rep. 11 Eq. 428.
(4) Ibid. 4 Eq. 453.

part of the assets of the intestate. The rule that a summons must be issued, in the case of an examination by the official liquidator, under sect. 115 of the *Companies Act*, 1862, has no application to an ordinary examination under 15 & 16 Vict. c. 80, s. 30, or 15 & 16 Vict. c. 86, ss. 40, 41. The evidence given before the Special Examiner cannot be used against the witness in the action, and his refusal to answer the questions on the ground of privilege cannot be sustained.

SIR JAMES BACON, V.C.:—

Upon the question of form there can be no objection. Having regard to the practice in Chambers as regulated by statute and the Orders, I must assume that the subpœna for the attendance of this gentleman was regularly and properly issued and served. The receiver was entitled to examine any person who could give information as to what were the assets; and Mr. *Dobson*, when summoned to give evidence, was bound to answer all lawful questions properly put. But he cannot, on that pretence, be compelled to answer any questions relating to the actions at law in which he was a Defendant. He was entitled to say that he refused to answer any question which might affect his interest or shew his liability in respect of the subject-matter of the action, while, on the other hand, the receiver was entitled to extract from him any other information that he could give as to the testator's estate. On the certificate the matter is left in some obscurity, as it merely states that the witness was interrogated with reference to a bill of exchange accepted by him, without saying what questions were put to him or what particular question it was that he refused to answer. Many other questions, of course, might be put to him which had nothing to do with these bills of exchange, and which he could not escape from answering. The notice of motion does not make the matter any clearer, and on the materials before me I cannot say that the witness was wrong in declining to answer. With this intimation of opinion, the witness will be ordered to attend before the Special Examiner for the purpose of being examined as a witness by Plaintiff. Costs reserved.

Solicitors: Messrs. *Abrahams & Roffey;* Messrs. *G. S. & H. Brandon.*

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for V.-C. W.
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March 22.

PHIPPS *v.* LOVEGROVE.

[1870 P. 214.]

PROSSER *v.* PHIPPS.

[1871 P. 76.]

Settlement—Trustee and Cestui que Trust—Power—Appointment by Wife—Notice to Original Trustees—Appointment of New Trustees of Settlement—Dealing with Trust Funds—Non-liability of New Trustees—Priority—Duty of New Trustees—Practice of the Court.

Funds belonging to *L. M.* were, on her marriage in 1834, vested in three trustees (one of whom died in 1840) in trust for her for life for her separate use, without power of anticipation, and after her death for the children of the marriage, and in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband and wife executed a deed to secure the payment of moneys due from him, and the wife appointed that in case there should be no child of the marriage, and if she should die in the husband's lifetime, the trustees of the settlement of 1834 should, out of the trust funds, raise sufficient to pay the husband's debt.

Notice was given of the deed of 1843 to the two surviving trustees of the settlement.

In 1848 the wife and the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, and assigned to them the trust funds. One of those trustees died, and the two surviving trustees and the survivor of them, at the request of the husband and wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in March, 1870, without having had any child. The husband survived. The survivor of the trustees of 1848 in May, 1870, received a notice from *R. L.* of a charge on the leaseholds in his favour, dated the 5th of October, 1864; and in October, 1870, he received a notice of the deed of 1843:—

Held, that the surviving trustees of 1848 were not liable to make good the funds which had been lost; that *R. L.* was not entitled to priority over the trustees of the deed of 1843; and that the persons claiming under the deed of 1843 were entitled to the funds which remained in part satisfaction of the moneys due to them.

Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a distringas on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into Court.

Semble: New trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance; and it has never been the practice of the Court on appointing new trustees of funds to make such an inquiry.

THESE causes came on to be heard together on motions for a decree. On the marriage in June, 1834, of the Defendants,

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Thomas Lovegrove and *Louisa Marsack*, a settlement was executed, and thereby a sum of £3360 14*s.* 8*d.* £3 per Cent. Consolidated Bank Annuities, and a sum of £2000 £3 per Cent. Reduced Annuities, were vested in *R. Becher*, *H. Hammersley*, and *J. Holding*, in trust, during the joint lives of *T. Lovegrove* and his wife, to pay the income to her for her separate use without power of anticipation, and after her decease, whether she should survive or should die in the lifetime of *T. Lovegrove*, in trust for the children of the marriage, and in case there should be no such children, in trust for the wife if she should survive *T. Lovegrove*, but if she should die in his lifetime, in trust for such persons as she should appoint, and in default of appointment, in trust for her executors, &c. The deed contained a power for the wife to appoint new trustees in certain cases, and also the usual provisions for the protection of the trustees from being answerable for the acts or defaults of one another, or for the insufficiency of the securities, or for any involuntary losses; and for the indemnity of the trustees. Some time prior to his marriage in 1834, *T. Lovegrove* had, as a trustee, become indebted to *Ann Dodson* in respect of a sum of £2000, which he had received and mixed with his own moneys, and wasted. Proceedings in equity were taken against him, and ultimately an indenture dated the 18th of December, 1843, was executed by him and his wife, whereby he covenanted to pay to *Ann Dodson* the moneys due as therein mentioned, and his wife, in exercise of her power under the deed of 1834, appointed that in case there should be no child of her marriage with *T. Lovegrove*, and if she should die in his lifetime, the trustees of the deed of 1834 should, out of the trust funds (subject to the trusts of that deed), and annual produce thereof, or such parts as should not have been applied or disposed of under any of the trusts in the deed, raise such sums of money as should be equal in amount to the sum of money remaining due, or thereafter to accrue due, to *Ann Dodson*, her executors, &c., on account of the moneys and costs in respect of *T. Lovegrove's* debt. There was a provision in that deed that it should be lawful for Mrs. *Lovegrove*, notwithstanding that appointment and subject thereto, so long as any moneys remained due, to appoint such further trusts concerning the funds in the deed of 1834 as to her should seem proper.

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Notice in writing of the appointment of 1843 was sent to the house of *R. Becher*, at *Brighton*, on the 19th of April, 1844, and a duplicate was sent to *J. Holding* on the 20th of April, 1844. The other trustee, *H. Hammersley*, had died in 1840. The evidence on the part of the Plaintiffs in the second suit was that both *Becher* and *Holding* were requested to acknowledge the receipt of the notice; and the solicitor who sent the notices verily believed that they did do so, but the letters acknowledging such receipt could not be found. It was believed that they had long since been, with other papers connected with the suit, destroyed. *R. Becher*, having died, and *J. Holding* being desirous of retiring from the trusts of the deed of 1834, Mrs. *Lovegrove*, by a deed dated the 12th of April, 1848, indorsed on the deed of 1834, and to which *J. Holding* was a party of the first part, appointed *H. Hall*, *E. J. Phipps*, and *P. Johnson*, to be new trustees of the funds above mentioned, less a sum raised by a sale of a sufficient part of the £2000 stock to pay £22 7*s.*, the costs of the deed, &c. *P. Johnson* died prior to 1856. The moneys due and owing to *Ann Dodson* (who died in March, 1856) on the security of the indenture of December, 1843, became vested in trustees—the Plaintiffs in the second suit.

In 1863 proceedings at law were taken against *T. Lovegrove* for the recovery of the moneys due from him to the estate of *Ann Dodson;* and ultimately a judgment by consent was entered against him for the sum of £2108 and costs. The surviving trustees, *E. J. Phipps* and *H. Hall*, at the earnest request of Mr. and Mrs. *Lovegrove*, there having been and there being no reasonable probability that there ever would be any issue of the marriage, invested a portion of the trust funds (£1972 9*s.* 9*d.* of the £3 per Cent. Reduced Annuities) in the purchase of an annuity of £100 6*s.* for their joint lives and the life of the survivor, and Mrs. *Lovegrove*, by deed dated the 11th of February, 1856, and indorsed on the deed of 1834, appointed that *Phipps* and *Hall* should stand possessed of the annuity during the joint lives of herself and her husband, upon trust for her, free and independent of his debts, and after the decease of either of them, in trust for the survivor; and the husband covenanted that neither he nor his wife would at any time during their joint lives require the trustees to replace the said sum of £1972 9*s.* 9*d.*

In the course of the same year, the same trustees, at the request of Mrs. *Lovegrove*, sold out a sum of £250 £3 per Cent. Consols (leaving the sum of £3110 14*s.* 10*d.* consols in their names), and paid some of the proceeds to her, or by her direction, to her husband, and applied the residue in payment of certain costs.

In February, 1858, and in July, 1861, further sums of the trust funds were sold out, and at the request of Mrs. *Lovegrove* a part of the proceeds was invested in the purchase of leasehold premises, situate at *Camberwell*, and assigned to the trustees upon the trusts of the settlement, and the other part was paid to *T. Lovegrove* and his wife, and for certain costs.

H. Hall died prior to December, 1863.

E. J. Phipps, the surviving trustee, in December, 1863, at the request of Mrs. *Lovegrove*, sold out another part of the trust funds, paid the proceeds to her, and he subsequently sold the remaining consols and paid the proceeds to her.

By a deed in May, 1867, the leasehold premises and the remaining trust funds were (subject to the trusts of the settlement which had priority to the power vested in Mrs. *Lovegrove*) vested in *E. J. Phipps*, his executors, &c., for the purpose of indemnifying him and the estate of *H. Hall* against all costs, charges, losses, and expenses which they should sustain by reason of the before-mentioned transactions in reference to the trust funds. In February, 1870, there was, by the request of Mrs. *Lovegrove*, a conversion of the remaining trust funds into cash. A part of the money was paid to her, and the residue was invested in £5 per Cent. *India* Bonds.

Mrs. *Lovegrove* died on the 26th of March, 1870. The property comprised in the settlement consisted at her death of £1775 17*s.* 1*d.* *India* Bonds, the annuity of £100 6*s.* for the life of *T. Lovegrove*, and the leasehold premises at *Camberwell*. Up to the time of her death *E. J. Phipps* had had no notice of any charge or incumbrance by Mrs. *Lovegrove* upon the property.

He stated that he was aware that the advances which had been made were technically breaches of trust on his part, inasmuch as Mrs. *Lovegrove* was restrained from anticipation; and that if she survived *T. Lovegrove* she might require him to make good the

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said breaches of trust; but, relying on her honour, he was content to take that risk rather than refuse her requests.

On the 17th of May, 1870, Mr. *Phipps* received a notice, on behalf of the Defendant *R. Lovegrove*, to the effect that Mr. and Mrs. *Lovegrove* had by a deed dated the 5th of October, 1864, agreed to charge the leasehold premises at *Camberwell* with the payment, on the decease of Mrs. *Lovegrove*, of £200 and interest. It was also agreed that the reversion only of the leaseholds should be liable, and that Mrs. *Lovegrove* should during her life not be called upon for the repayment of the money. *R. Lovegrove* also claimed two sums of £40 and £32, which he had advanced to Mr. and Mrs. *Lovegrove* on their personal security.

On the 7th of October, 1870, Mr. *Phipps* received a notice, on behalf of the trustees claiming under the deed of 1843, of the incumbrance created thereby; and that was, as he alleged, the first notice received by him that the trust property had been in any manner dealt with prior to his appointment as trustee. There was no notice of any incumbrance amongst the papers in the possession of his solicitors. Immediately the trustees claiming under the deed of 1843 discovered that the trust funds had been dealt with, they obtained a distringas to prevent any further transfer of the remaining funds. The amount alleged to be due to the trustees claiming under the deed of 1843 was, in the whole, including interest and premiums on policies, the sum of £4216 6*s.* 7*d.*

After a correspondence which took place between the parties in reference to their claims, Mr. *Phipps*, on the 22nd of December, 1870, filed his bill, praying that the trusts of the deed of 1834 might be carried into effect under the direction of the Court, and that the moneys still remaining in his hands as the sole surviving trustee might be distributed amongst the parties entitled thereto according to their respective rights; and for accounts and inquiries.

The trustees claiming under the deed of 1843 also filed a bill, in 1871, and after setting forth the facts above mentioned, and charging that by virtue of the notice, or irrespective thereof, they were entitled to be satisfied, their claim prayed that it might be declared that they were entitled in priority to all other claimants to

have their claim, together with their costs of the suit, satisfied out of the trust funds; for an account; that the sum of £1775 17*s.* 1*d.* *India* Bonds, the annuity, and the leasehold premises at *Camberwell*, and all other the trust property (if any) might be sold and the proceeds applied in satisfaction of what should be found due to them; that if the property subject to the trusts of the deed of 1834 should be insufficient to satisfy their claim, then that Mr. *Phipps* personally, and the Defendants, the representatives of *H. Hall*, out of their testator's estate, might be ordered to make good such deficiency; and for consequential relief.

Mr. *Greene*, Q.C. (Mr. *Miller*, Q.C., and Mr. *W. W. Cooper* with him), for Mr. *Phipps*, after stating the facts and submitting that, as he never heard anything of the notice to the trustees claiming under the deed of 1843 until after some of the trust funds had, by the earnest request of Mrs. *Lovegrove*, been dealt with, he was not liable to make good such trust funds, was stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *E. Cutler*, for the trustees claiming under the deed of 1843 (the Plaintiffs in the second suit):—

The evidence that notice of the deed of appointment of 1843 was given to the two surviving trustees of the settlement is clear and distinct. The appointee, *Ann Dodson*, did all that was necessary and in her power to do, and, according to the authorities, she made at the time her title as perfect as it could be made. Where there are several trustees, if notice is given to one and not to the others, and if that one dies and still notice is not given to the others, any one coming in by subsequent title and giving notice will have priority; but here the notice that was sent was sufficient to protect the title of the appointee, who was just as much a *cestui que trust* as any child of the marriage could have been. We submit that the new trustees of 1848 ought to have made inquiries whether any appointment had been made, but that they did not do. Moreover, they took subsequent deeds of appointment from Mrs. *Lovegrove*, but in no one of them is there a covenant on the part of the appointor that no appointment had been made by her to any other person. They have been guilty of negligence in not making inquiries as to any other appointment, and they have parted with the trust funds, and for their negligence

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they must be held liable for the loss which has been sustained by the trustees claiming under the deed of 1843, who have not been guilty of any negligence.

[SIR W. M. JAMES, L.J.:—Have you any authority that new trustees are bound to ask the surviving trustee whether any notice had been given him of an incumbrance?]

No; but it was their duty to make such inquiry. Yet in every instance in which a breach of trust was committed a deed was taken from Mrs. *Lovegrove*, and the new trustees were silent as to whether any appointment had been made by her or not. It would be a dangerous thing if the Court were so to recognise a mode of dealing with property by trustees as that persons who had done all that they could do were to suffer, and the persons who had not done that which they ought to have done were to escape or get off without injury.

[SIR W. M. JAMES, L.J.:—Why did the appointee or the trustees claiming under her not file a bill to have the fund secured?]

The Court recognises this mode of dealing with equitable and assignable interests; and the appointee did not anticipate any danger. She gave notice to the proper persons—the legal owners at the date of her deed; and there is no authority for holding that notice should be given to every succeeding trustee. The trustees claiming under the deed of 1843 ask for a decree substantially in the terms of the prayer of their bill.

[SIR W. M. JAMES, L.J.:—There was no breach of trust except as against Mrs. *Lovegrove*, and that was personal to her.]

There was the restraint against anticipation, yet the trustees of 1848 dealt with the funds. They did what they ought not to have done, and they ought to be held responsible directly and collaterally.

[They cited *Robinson* v. *Wheelwright* (1); *Whittle* v. *Henning* (2); *Clough* v. *Bond* (3); *Caffrey* v. *Darby* (4).]

Mr. *Cookson* appeared for the Defendants, the representatives of *H. Hall*, who were in the same position as Mr. *Phipps*, and for

(1) 6 D. M. & G. 535. (3) 3 My. & Cr. 490.
(2) 2 Ph. 731. (4) 6 Ves. 488.

Robert Lovegrove; and for him he submitted that he was, in consequence of the notice which he in May, 1870, gave to the trustees, and considering the terms of the settlement of 1834, entitled in priority to the trustees claiming under the deed of 1843. He referred to *Timson* v. *Ramsbottom* (1); *Meux* v. *Bell* (2); *Foster* v. *Blackstone* (3).

Mr. *Everitt*, for other Defendants in both suits.

SIR W. M. JAMES, L.J., after stating that he did not think *Robert Lovegrove* was entitled to any priority, continued:—

I am of opinion that upon the first and main question which has been argued before me, no case has been made for fixing the trustees with any liability. These trustees were appointed by a deed in the year 1848. In that deed the old trust deed was recited, and the trustees were to hold the funds subject to the trusts mentioned in that deed. Those trusts were for the wife for life without power of anticipation, and in the events that have happened, as she should by deed or will appoint. Those were the sole trusts of which the trustees of 1848 were made aware. Before that date, and in the lifetime of the previous trustees, there was an assignment, and notice of it is proved to have been given to the two surviving trustees. If it were material, I should then hold that the receipt of that notice was acknowledged by them, because it seems to be consistent with every fact in the case that the acknowledgment was given, but not put amongst the muniments of title of the trustees. But notice was given, and so far the equitable title was completed, that there was this outstanding interest at the time when the new trustees were appointed; but they knew nothing of it. They were trustees, no doubt, for a married woman without power of anticipation, that is to say, so far as the income for her life was concerned; and they were bound, of course, not to allow her to anticipate the income; but, subject to that, it seems to me they were right in considering the position of the husband and the wife. I assume they thought there was no probability or possibility of issue at that time, and there never having been any

(1) 2 Keen, 35. (2) 1 Hare, 73.
(3) 1 My. & K. 297.

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issue, rights of issue are not in any way in question. Both parties, in fact, claim by reason of there having been no issue. That being so, the trustees, at the request and by the direction of the only *cestuis que trust* of whom they had any notice or knowledge whatever, dealt with the funds; and it appears to me, upon more than one ground, that any person claiming under the same *cestuis que trust* has no right to make any claim against them. It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor. Down to the date at which the notice of assignment was given to the trustees, the trustees were at liberty to deal with the fund, and to have equities created in their favour by the *cestuis que trust*, until they received notice that some other person had come in and displaced those equities. An insurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy, of which no notice had been given to them. Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestui que trust*, and get a beneficial interest in the trust property if they have no notice that there have been any prior incumbrancers. They have got the legal estate and they have got the legal right; they have therefore got, in respect of the charge created in their favour, before they have got any notice of anything else, a right to retain that which the law has given them.

Then in this case, practically, what are the remaining funds? They are the leaseholds, the annuity, and so forth—they have all been expressly appointed to these gentlemen by way of indemnity to them; and the funds that remain are in value rather more than the funds that were lost; so that if they were to replace the funds that are lost, they would be entitled to take away the funds that remain under the very appointments made in their favour, to recoup them. But it is said, "They are not entitled to have the benefit of that charge — they are not like any other persons who have got the benefit of a charge, because it

was made with reference to some breaches of trust which they had previously committed." It appears to me that in a case like this the expression "breaches of trust" is a rhetorical expression, which may be used for the purpose of throwing a sort of doubt or suspicion upon the case; but it cannot really avail for any practical purpose, having regard to the nature of the breach of trust. The only possible breach of trust, as it appears to me, that can be suggested against these gentlemen is, that they allowed the wife to create, by way of anticipation, something affecting her life estate; but that was, as it appears to me, a mere personal right and a mere personal equity belonging to her, and can give no right whatever to any other person except herself and her representatives. In truth, there never was any practical breach of trust committed; because, although the whole income of the remaining funds was not so great as the income from the original funds, yet it was not very different. There was an annuity of £100 a year, and there were always ample funds, beyond all question, for securing to the wife at any moment, or for all time during her life, the whole of the income which she was to receive, free from anticipation; and she, in truth, as far as I can make out, never failed to receive an income equivalent to what she would have had if the funds had remained in the Three per Cents, giving her about £150 a year. The leasehold premises produced about £100 a year, and there was the other sum. Therefore there never was any breach of trust practically. Under the circumstances, it appears to me that the trustees have a right to avail themselves of the charge that was created in their favour by the *cestuis que trust* of whom alone they had notice, in respect of that which was a valuable consideration; that is to say, just in the same way as if instead of selling out part of the trust funds and lending it to the husband and wife, they had themselves advanced so much money out of their own pockets and lent it to the husband and wife upon a charge upon this property. It practically comes to exactly the same thing as if they had done it in that way. I am of opinion, therefore, that the charge against the trustees must fail. It is one of the infirmities which always attach to securities of this kind. It was pressed upon me that if I held this I should be destroying entirely these assignments of equitable interests—that it would be

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making them wholly valueless if they are liable to be destroyed in this way. Even if that should be the result, still it appears to me it would be far more injurious to hold that trustees could not deal in this way by consent of the only *cestuis que trust* of whom they had notice. But the result which has been represented as so alarming does not follow; because, after all, the trustees claiming under the deed of 1843 might have saved themselves all this risk and all this loss by the simple process of putting a distringas on the funds; or they might have had an indorsement of their security upon the deed of 1834; or they might have resorted to the course of filing a bill for the execution of the trusts, and bringing the trust funds into Court. Therefore, if either of those precautions had been taken, the loss could not have happened; and in like cases lenders may have recourse to any of those precautions, if they wish to prevent that happening which, of course, they are liable to, from the fact that trust funds are liable to changes of trustees, and non-transmission of notice given to one set of trustees to the succeeding set of trustees.

It was said that the new trustees ought to have inquired of the old trustee whether he had received any notice of incumbrances, and that they had not made that inquiry, and therefore they are answerable, because they would have had notice; assuming the old trustee to have been an honest man, they would have been informed of the notice which he received. I am not aware that it is the practice of new trustees to inquire of old trustees whether they have received any notice or not, and I am quite sure this Court has never done it. If it is a wrong thing for new trustees to accept trust funds in these circumstances without inquiring specifically whether the old trustees have received any notice of incumbrances—if that is a fault on the part of new trustees, it is a fault into which they have certainly been led by the example of this Court; for I never heard of that being asked. I have made orders over and over again appointing new trustees, and vesting the trust property in the new trustees absolutely, without any dealing with the old ones at all. I have never heard anything of requiring an affidavit or evidence that the old trustees had received no notice of any incumbrances. It may be right that it should be done in future, and that the Court should

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require it, but certainly it never has been the practice. I am not aware that it ever is done in the ordinary course of business by conveyancers. I think it would introduce a new liability very hard indeed upon trustees if they are to be fixed with any consequences for the want of making that inquiry. Mr. *Dickinson* seemed to think that the fact that it would be a very great hardship upon trustees to be held so liable was rather a *primâ facie* argument in favour of its being the correct equitable rule, from the mode in which this Court has been in the habit of fixing trustees with liabilities in a way which does not always commend itself to the common sense or the sense of common justice of people outside this Court. Things have been done in some cases, perhaps, which people outside this Court may think not very desirable, but I certainly am not the Judge to extend liability as against trustees who have honestly endeavoured to do their duty, and have been guilty of no dishonesty whatever, even where it is said they have been guilty of what is called a technical breach of trust as between them and some one who has no right to complain, who has no ground of complaint, and does not complain. I am of opinion, therefore, that the case fails.

But with regard to the priorities between the trustees claiming under the deed of 1843 and *Robert Lovegrove*, who claims to have a specific charge upon the leaseholds for £200 advanced by him—with regard to that, it stands in this way: the property upon which it is a charge is leasehold property, as to which notice to the trustees was immaterial. No notice to trustees has anything to do with the priority of such incumbrances. Now how do these incumbrances stand? It is said that part of the moneys was invested in this leasehold property, and that the trustees claiming under the deed of 1843 have a right to follow it; that their equity was an equity attached to that property before the new equity was created in respect of it; and they say they are prior. Notice has nothing to do with it, as it is admitted there is no question of priority of notice; priority of title remains, and the title of the man whose trust funds were invested in that property is in equity prior in point of date and in point of law to an equitable charge subsequently created.

Therefore it appears to me clear that there must be a decla-

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ration that the trustees of 1848 are not liable to make good the funds which they have dealt with under the direction of the husband and wife; but as to the other funds which remain, the declaration will be that they belong to the trustees claiming under the deed of 1843 in part satisfaction of the debt due to them, and that they are entitled in priority to the claim of *Robert Lovegrove*, or any other claim.

Solicitors: Messrs. *Walter, Moojen, & Son*, agents for Messrs. *Salmon & Son, Bury St. Edmunds;* Mr. *Percy C. F. Tatham;* Mr. *James Cooper;* Messrs. *Torr, Janeway, & Co.*, agents for Messrs. *Osborne & Co., Bristol;* Messrs. *Pownall, Son, Cross, & Knott*, agents for Mr. *W. H. Walsh, Oxford;* Mr. *Richard Hervé Giraud.*

V.-C. W.
1873
April 25.

In re HODGES' LEGACY.

Will—Condition precedent—Non-compliance—Gift over.

LQR 18Eq 296-7
7HL442

Gift to *F.* of £17,000, provided that, upon attaining twenty-one, or within six months next after, he should, by such legal instruments as counsel should advise, at the cost of the executrix, relinquish and make over to his brother and sister all interest under his parents' settlement; and in case he should neglect to do so within that time, the £17,000 should be reduced to £12,000, and the £5000 should fall into the residue. The legatee was in *India*, serving in the army, at the time specified, and was not informed of the clause, but he subsequently relinquished and made over all interest under his parents' settlement to his brother and sister:—

Held, that the £5000 belonged to the residuary legatees.

THE Rev. *Thomas Hodges*, by his will, dated the 26th of September, 1864, after giving several bequests, and directing payment of his just debts and the conversion and investment of his property, directed his trustees to stand possessed of his residuary estate upon trust, in the first place, to pay the interest to such person as his widow should appoint; and from and after her decease, upon trust as to £17,000 to apply a competent portion of the dividends for the maintenance and education of his grandson, *F. D. Edwards*, until he should attain the age of twenty-six, and to pay the residue of the dividends of such sum to his (*F. D.*

Edwards') mother. And from and after his grandson attaining that age, and after his (testator's) widow's decease, subject to the several provisoes thereinafter mentioned, he directed his trustees, until the expiration of twenty-one years from the testator's death, or the end of the year 1873, whichever should first happen, to pay the yearly dividends to his said grandson; and at the expiration of twenty-one years, or the end of the year 1873, whichever should first happen, upon trust to transfer the said £17,000 stock to his said grandson; and in case he should die previously, upon trust for such persons as he should by will appoint; and in default of such appointment, he directed the said £17,000 stock to sink into the residuary personal estate. The testator then directed that, in case his said grandson should anticipate, assign, or incumber, all his right to appoint the same should be null and void, and the said stock should go as if his grandson had died in his (testator's) life-time. And the testator declared it to be his will that, subject to the above proviso and two following ones, his grandson should take a vested interest in the said stock at the time appointed for the transfer to him of the same, though testator's widow might be still living:

"Provided further, and it is my will and my desire, that my said grandson, upon his attaining the age of twenty-one years, or within six calendar months next thereafter, shall, by such legal instruments as counsel shall advise, at the costs of my executors, relinquish and yield up all his right, estate, and interest in the estates and property comprised in the marriage settlement of his father and mother, and make over, assign, convey, and assure the same unto and to the use of or for the benefit of his brother *Henry* and his sister *Marianna*, equally between them, or the survivor of them, or the heirs, executors, or administrators of such survivor. And in case he shall neglect to do so within the time aforesaid, then from thenceforth I reduce the aforesaid legacy of £17,000 stock to £12,000 stock, confirming the latter sum to my trustees upon the trusts above declared of and concerning the said £17,000 stock; and declaring my will in that case to be that the remaining £5000 stock, residue of the £17,000, shall sink into and become part of my residuary personal estate." Then followed a proviso that his grandson, within one year after attaining twenty-six, or so

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soon as the Sovereign's licence could be obtained, should use the surname of *Hodges* in place of *Edwards;* and in case he should neglect to petition for and endeavour to obtain such licence within the time above mentioned, then the £17,000 stock or £12,000 stock should sink into and become part of the residuary personal estate, as if his said grandson had died in his lifetime. The testator then directed his trustees to hold the residue, after the death of his wife, upon trusts which were substantially for the benefit of his granddaughter *Marianna* and his grandsons *Thomas* and *Henry*. He appointed his widow and his granddaughter *Marianna* executrixes, and Sir *F. Pollock* and *Hayes Plumptree* executors. The testator died on the 18th of April, 1847, and his will was proved by his executors in the May following. In April, 1858, his granddaughter married, and a settlement was executed on her marriage. The testator's grandson, *F. D. Edwards*, was born on the 24th of January, 1836, and attained twenty-one in January, 1857, at which time he was serving in Her Majesty's army in *India*. He returned to *England* in 1859, and in June, 1862, by virtue of royal license, he assumed the name of *Hodges*. By an indenture dated the 29th of April, 1862, he relinquished to his brother and sister all interest under his parents' settlement, in conformity with the will; and by an indenture dated the 15th of July he made an appointment of the £17,000 stock subject to a power of revocation.

A question having arisen whether there had been a sufficient compliance with the proviso in the will as to the surrender by *F. D. Edwards* of his interest under his parents' settlement, the trustees paid the sum of £5000, part of the £17,000 stock, into Court under the Act. *F. D. Hodges* then presented this Petition for payment of the fund to him on the footing that the condition had been sufficiently performed.

Mr. *C. Hall*, and Mr. *E. Harrison*, for the Petitioner:—

There is no case exactly like this in the books. There was nothing to be done by the legatee till he was put in motion by other persons. He was to execute a legal instrument which the executors were to cause to be prepared by counsel at the cost of the testator's estate. Until, therefore, the executors had caused this instrument to be prepared for execution by the devisee, there

could be no neglect on the part of the legatee. This is only what is required by the will.

Non claim is not necessarily neglect to claim, though in some cases it may be so construed, as in *Hawkes* v. *Baldwin* (1); but here there could in no sense be neglect by the legatee till he had been put in motion by the executors. There is really no authority that governs this case. In *Simpson* v. *Vickers* (2) the act to be done was by the legatee himself without anything further, and having failed to comply with the condition the gift failed. The same observation applies to *Tulk* v. *Houlditch* (3).

It is submitted, therefore, that the Petitioner is entitled.

Mr. *Kingdon* appeared for the trustees of the testator's will, but took no part in the argument.

Mr. *Whitehorne*, for *Thomas Edwards*, one of the residuary legatees:—

This has been treated as a case of mistake and forfeiture instead of a gift over, in which very different rules of construction prevail. In the latter case the Court never relieves, because the interests of third parties are affected. The rule was very distinctly stated in the case of *Hollinrake* v. *Lister* (4), and in the case of *Cleaver* v. *Spurling* (5), where it was held that the subject-matter of the gift having vested in the devisee over, equity would not divest it (6). *Simpson* v. *Vickers* was cited by the legatee's counsel, but it is really an authority against him. In *Davis* v. *Angel* (7) Lord *Westbury* laid it down that where the condition applies to the whole gift no interest arises till the event takes effect (8). Then it is said that there is no gift over, but an express disposition of the residue is a gift over (9); *Lloyd* v. *Branton* (10); and in *Hawkes* v. *Baldwin* it was laid down that residuary legatees are as much objects of testators' bounty as specific legatees. On the subject of costs the Court has jurisdiction to direct payment out of the fund: *In re Trick's Trusts* (11).

(1) 9 Sim. 355.
(2) 14 Ves. 341.
(3) 1 V. & B. 248.
(4) 1 Russ. 500.
(5) 2 P. Wms. 526.
(6) 2 P. Wms. 528.
(7) 4 D. F. & J. 524.
(8) Ibid. 527.
(9) Ibid.
(10) 2 Mer. 108.
(11) Law Rep. 5 Ch. 170.

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Mr. *Greene*, Q.C., and Mr. *Brooksbank*, for the trustees of one of the grandchildren, adopted the same arguments.

Mr. *Hall*, in reply:—

All the cases cited are cases of conditions precedent or of alternative gifts, and have no application to this case. The principle is laid down clearly in *Harrison* v. *Round* (1).

SIR JOHN WICKENS, V.C.:—

What the testator required has not been done, and the Court cannot make a will for him, and say that, under all the circumstances, compliance with the condition ought not to be exacted from the legatee. It is clear, upon authority and principle, that neither ignorance, illness, nor neglect on the part of the executor to inform the legatee can excuse him for not complying with the direction so as to entitle him to the gift. There must be a declaration that the fund forms part of the testator's residue, and has not passed to the Petitioner.

Solicitors for the Petitioner and some of the Respondents: Messrs. *Bridges, Sawtell, & Co.*

Solicitor for the other Respondents: Mr. *W. Jaquet.*

(1) 2 D. M. & G. 190.

Ex parte TILL. *In re* MAYHEW.

C. J. B.
1873
April 28.

Liquidation—Appointment of Receiver—Landlord—Distress for Rent levied without leave of Court—Contempt—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), s. 34—*Bankruptcy Rules*, 1870, *rr.* 260, 299.

After a liquidation petition had been filed and a receiver had been appointed, and had taken possession of the debtor's property, the debtor's landlord, without asking the leave of the Court, levied a distress for a year's rent due to him. The Judge of the County Court restrained the landlord from proceeding with his distress, and ordered him to be committed for contempt of Court:—

Held, that the Court could not interfere with the statutory right given to the landlord by sect. 34 of the *Bankruptcy Act*, 1869; and the order for committal discharged.

THIS was an appeal from a decision of the Judge of the County Court at *Ipswich*.

W. P. Mayhew, a grocer at *Butley*, *Suffolk*, filed a petition for liquidation on the 21st of February, 1873, and on the same day *W. J. Andrews* was appointed receiver and manager of the debtor's estate, and he, on the 24th of February, took possession of the debtor's goods. *Mayhew* occupied a shop as tenant to *Joseph Till*, deceased, whose estate was being administered by the Court of Chancery in a suit of *Cook* v. *Till*, and in that suit *Martha Till* and *S. W. Baggs* had been appointed receivers. On the 3rd of March they distrained on the goods of *Mayhew* for £22 10s., being a year's rent due the 22nd of November, 1872. This distress was levied without any application having been made for the leave of the County Court in the liquidation. The receiver in the liquidation, on the 6th of March, obtained an interim order restraining the proceedings under the distress, and served the landlord with a notice of motion for an order to make the injunction absolute and to commit *Martha Till* and *Baggs* for contempt of Court in levying the distress without the leave of the Court. On the 13th of March the Judge made the injunction absolute, and ordered *Martha Till* and *Baggs* to be committed for contempt of Court, but directed that no warrant for their apprehension should issue for six months, or for such further time as might be necessary to take the opinion of

C. J. B. 1873 *Ex parte* TILL. *In re* MAYHEW.

the Court of Appeal. His Honour said that he considered himself bound by a decision of Mr. *Daniel*, the Judge of the County Court at *Bradford*, in *Ex parte Smith*, heard on the 28th of November, 1871, of which a report is given in 52 *Law Times* (Journal), 104. From this decision the landlord appealed.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for the Appellants, stated the facts. They were then stopped by the Court.

Mr. *Bagley*, for the receiver in the liquidation :—

A receiver appointed by this Court is entitled to the same protection as a receiver appointed by the Court of Chancery. When a receiver has once been appointed by that Court it will not allow his possession to be disturbed by any one without the leave of the Court being first obtained: *Sutton* v. *Rees* (1); *Russell* v. *East Anglian Railway Company* (2). *Ex parte Smith*, upon which the County Court Judge relied, is directly in point.

SIR JAMES BACON, C.J.:—

It is very new to me to hear that a receiver in bankruptcy can do what has been done here. If an application had been made to the Court it could not have interfered with the landlord's statutory right. *Sutton* v. *Rees* is a case which does not hold out any encouragement to a landlord to be forbearing. *Russell* v. *East Anglian Railway Company* refers to the rights of an execution creditor, which are quite different from those of a landlord. The statute gives the landlord a right to distrain, after the commencement of the bankruptcy, for a year's rent. There is nothing in the rules to give the receiver the powers or rights of a receiver appointed by the Court of Chancery. Any order made to restrain proceedings in the distress should have been made upon the terms of the landlord being paid what was due to him, or of the amount being secured for him. Nothing of the kind was done. The thing was carried out with a high hand, and the landlord was told that if he proceeded to enforce the right which the statute gives him he would go to gaol. The Court had no right to interfere without seeing that justice was done to the land-

(1) 9 Jur. (N.S.) 456. (2) 3 Mac. & G. 104.

lord. The appointment of the receiver was to receive property which was liable to a distress for rent. I cannot conceive how such an order as this can be sustained, which provides no fund for the payment of the landlord. He had no notice of the appointment of a receiver till he went in with his distress. To make an order restraining a man from proceeding with his statutory right, without at the same time making a provision for his payment, is a thing which the Court of Chancery has never done and never will do. The order must be discharged, with the costs in the County Court.

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Solicitor for the Appellants: Mr. *J. N. Mason.*

Solicitors for the Receiver: Messrs. *Morley & Shirreff*, agents for Mr. *J. M. Pollard, Ipswich.*

Ex parte EYLES. *In re* EDWARDS.

C. J. B. 1873 *April* 28.

Liquidation—Title of Trustee—Relation back—Act of Bankruptcy before filing of Petition—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 15, 125.

The title of the trustee in a liquidation by arrangement relates back to an act of bankruptcy committed by the debtor before the filing of the petition in the same way as that of a trustee in a bankruptcy.

On the 8th of February a creditor levied execution upon the goods of his debtor upon a judgment for less than £50. On the 10th of February, the sheriff not having sold, the debtor filed a liquidation petition, and a receiver was appointed. The debtor had, on the 16th of January, executed a bill of sale assigning all his property to secure a past debt:—

Held, that the title of the trustee under the liquidation related back to the execution of the bill of sale, and that he was entitled to the goods seized by the execution creditor.

9 Ch 40-1
3 Ch D. 456.
6 C L D 65.

THIS was an appeal from the decision of the Judge of the County Court at *Newport, Monmouthshire.*

On the 16th of January, 1873, *Henry Edwards,* a brewer at *Pontypool,* executed a bill of sale of the whole of his property to his brother *Charles Edwards,* to secure a debt previously due. On the 8th of February execution was levied upon the goods of *Henry Edwards* upon a judgment recovered against him in an action by *John Dyer* for £27 10*s.* and costs.

On the 10th of February, the sheriff not having sold, *Henry*

C. J. B. 1873 *Ex parte* EYLES. *In re* EDWARDS.

Edwards filed a petition for liquidation, and on the same day a receiver and manager of his property was appointed. On the same day, on the application of the receiver, an interim order was made restraining *Dyer* and the sheriff from proceeding under the execution.

On the 17th of February an application was made to the Judge to continue the injunction. He refused to do so, and made an order dissolving it. The receiver, who had been appointed trustee, then paid out the execution under protest, and presented an appeal from the decision of the Judge.

Mr. *De Gex*, Q.C., and Mr. *Petheram*, for the trustee:—

The title of the trustee relates back to the execution of the bill of sale, just as the title of the trustee in a bankruptcy would. In *Ex parte Rocke* (1) there was no act of bankruptcy antecedent to the filing of the liquidation petition. That the title of the trustee in a liquidation relates back in the same way as in a bankruptcy follows from the decision in *Ex parte Veness* (2), which would otherwise be inconsistent with *Ex parte Rocke*. The question of notice is immaterial, as the execution creditor is protected by sect. 95 of the Act only in the case of his execution having been completed by seizure and sale before the filing of the petition.

Mr. *Roxburgh*, Q.C., and Mr. *Hamilton Humphreys*, for the execution creditor:—

There has been no decision yet that this bill of sale was an act of bankruptcy. But if it was, *Dyer* is a secured creditor without notice of any act of bankruptcy when he seized. He is therefore protected by sect. 95: *Ex parte Rocke*; *Slater* v. *Pinder* (3). In liquidation proceedings, which are instituted by the debtor himself, the trustee's title cannot relate back beyond the filing of the petition: *Ex parte Duignan* (4). *Dyer* is clearly entitled to enforce his execution: *Ex parte Veness*; *Ex parte Todhunter* (5) *Ex parte Bailey* (6); *Edwards* v. *Scarsbrook* (7).

Mr. *De Gex*, in reply.

(1) Law Rep. 6 Ch. 795.
(2) Ibid. 10 Eq. 419.
(3) Law Rep. 6 Ex. 228; Ibid. 7 Ex. 95.
(4) Law Rep. 6 Ch. 605.
(5) Ibid. 10 Eq. 425.
(6) Ibid. 13 Eq. 314.
(7) 3 B. & S. 280.

SIR JAMES BACON, C.J.:—

The execution of the bill of sale in this case is clearly shewn by the evidence to have been an act of bankruptcy. The bankruptcy of a debtor may, by sect. 11 of the Act of 1869, commence at the time of the first act of bankruptcy proved to have been committed by him within twelve months before the adjudication; and by sect. 15 the trustee is entitled to all the property belonging to the bankrupt at the commencement of the bankruptcy; and by sect. 125, sub-sect. 5, all such property of the debtor as would, if he were bankrupt, be divisible among his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement; and by sub-sect. 7 the trustee under a liquidation is to have the same powers as a trustee under a bankruptcy, and the appointment of a trustee under a liquidation is to be equivalent to an order of adjudication in bankruptcy. Here, an act of bankruptcy having been committed by the execution of the bill of sale on the 16th of January, on the appointment of the trustee his title related back to that date, and from that time the goods were his. If there had been seizure and sale, that would have given the execution creditor a good title under sect. 95, he having no notice of the act of bankruptcy. But here there was seizure only, and the title of the trustee relates back to the 16th of January, and deprives the creditor of what he would otherwise have got. *Ex parte Rocke* (1) and *Slater* v. *Pinder* (2) do not apply, as there was no prior act of bankruptcy in either of those cases. The order of the County Court must be discharged, and the money which has been paid to the execution creditor must be refunded.

Solicitor for the Trustee: Mr. *R. J. Child*, agent for Mr. *J. Sayce, Abergavenny.*

Solicitors for the Creditor: Messrs. *Johnson & Weatheralls*, agents for Mr. *W. J. Lloyd, Newport, Monmouthshire.*

(1) Law Rep. 6 Ch. 795. (2) Law Rep. 6 Ex. 228; Ibid. 7 Ex. 95.

L. C.
for M. R.
1873
May 29.

MEACHAM *v.* COOPER.

[1871 M. 120.]

Practice—15 & 16 *Vict. c.* 86, *s.* 40—*Administration Suit*—*Affidavit verifying Accounts*—*Cross-examination*—*Vouching Accounts.*

An accounting party, who has brought his account into Chambers and verified it by affidavit, may be cross-examined on his affidavit before the account is vouched.

THIS was an administration suit in which the usual decree had been made. Under the decree the Defendant *Hughes*, who was the legal personal representative of a deceased executor, carried in an account which he verified by his affidavit. The Plaintiff served notice that he intended to cross-examine *Hughes* on this affidavit on several points, one of which was as to his means of vouching the account. *Hughes* appeared before the Examiner, but his counsel submitted that the examination ought not to be proceeded with before the account had been vouched. The Examiner held that the examination ought not to be proceeded with.

Mr. *Roxburgh*, Q.C., and Mr. *F. Thompson*, now moved that the Examiner might be ordered to proceed with the examination, and referred to *Lord* v. *Lord* (1); *McArthur* v. *Dudgeon* (2); *Lawton* v. *Price* (3).

Mr. *Cozens-Hardy*, for *Hughes*, submitted that the practice was not to take an examination on an affidavit verifying accounts until the accounts had been vouched. The Chief Clerk could insist on the vouchers being produced before him; if the examination were postponed, it might become unnecessary to take it at all; whereas if it were proceeded with, the vouchers might have to be produced twice, once before the Examiner, and once before the Chief Clerk, and thus double expense would be occasioned.

LORD SELBORNE, L.C.:—

The Examiner is a mere ministerial officer, and has no authority to lay down rules of practice as to the most convenient time for

(1) Law Rep. 2 Eq. 605. (2) Law Rep. 15 Eq. 102. (3) 16 W. R. 666.

taking examinations. There must be an order that the witness attend before the Examiner and be examined; and as the witness raised the objection, he must pay the costs of this motion.

L. C. for M. R. 1873 MEACHAM v. COOPER.

Solicitors: Mr. *Rowland Miller;* Messrs. *May, Sykes, & Raven.*

SIMPSON *v.* RITCHIE.

L. C. for M. R. 1873 *May* 30.

[1872 S. 325]

Partition Suit—Sale—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 10—*Costs.*

Since the passing of the *Partition Act,* 1868, the Court is no longer bound by the old rule as to the costs of partition suits.

In a suit for sale under the *Partition Act,* 1868, the Plaintiffs were owners of one moiety, and the Defendants of one fourth of the estate; and the owners of the remaining fourth were served with the decree:—

Held, that the costs of all parties ought to be paid out of the estate.

THIS was a suit by the owners of one moiety of certain real estate for a sale of the estate under the *Partition Act,* 1868. The Defendants were the owners of one fourth share of the estate. At the hearing a decree was taken simply directing inquiries as to who were the parties interested in the estate. These inquiries had been answered, and the cause now came on upon further consideration.

Mr. *Cookson,* for the Plaintiffs, asked for an order for sale, and a direction that the costs of the suit should be paid out of the proceeds of sale: *Miller* v. *Marriott* (1); *Osborn* v. *Osborn* (2); *Leach* v. *Westall* (before *Malins,* V.C., on the 30th of January, 1869).

Mr. *W. B. Heath,* for the Defendants, also asked that the costs might be paid out of the estate, pointing out that the particular co-owner selected by the Plaintiff as Defendant would be in a worse position than the other co-owners if his costs were not allowed out of the estate.

Mr. *Woodroffe,* for the owners of the remaining fourth, contended that no costs ought to be given up to the hearing. The *Partition*

(1) Law Rep. 7 Eq. 1. (2) Law Rep. 6 Eq. 338.

L. C. for M. R. 1873 SIMPSON v. RITCHIE.

Act, 1868, did not alter the practice of the Court with respect to the costs of a partition suit: *Landell* v. *Baker* (1). *Leach* v. *Westall* was a short cause, and the point as to costs was not argued.

LORD SELBORNE, L.C.:—

Having regard to the 10th section of the *Partition Act*, 1868, it cannot be said that the Court is bound by the old rule as to the costs of partition suits. It is impossible to lay down a general rule on the subject; and there may be cases in which the Court, in the exercise of its discretion, will follow the old practice; but in this case I think the costs ought to be paid out of the estate.

Solicitors: Messrs. *Sharp & Turner;* Mr. *S. Heath;* Messrs. *Kimber & Ellis.*

L. C. for M. R. 1873 *June* 3.

In re TOWNS' DRAINAGE AND SEWAGE UTILIZATION COMPANY.

MORTON'S CASE.

Company — Winding-up — Contributory — Contract to take Shares — Payment necessary to vesting of Shares — Transfer — Discharge of Contract.

M. agreed to take shares in a company incorporated by an Act of Parliament, providing that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share had been paid in respect thereof. *M.* transferred his shares without paying one-fifth of the amount thereof; the transfer was duly registered, and *M.'s* name removed from the register of shareholders. More than a year afterwards the company commenced to be wound up:—

Held, that *M.'s* original agreement to take shares was discharged by the transfer, which operated as a new contract between the company, *M.*, and the transferee.

THE *Towns' Drainage and Sewage Utilization Company* was incorporated by private Act of Parliament (30 & 31 Vict. c. clxxiii.), the 9th section of which provides as follows:—"The company shall not issue any share created under the authority of this Act, nor shall any share vest in the person accepting the same, unless

(1) Law Rep. 6 Eq. 268.

and until a sum not being less than one-fifth of the amount of such share has been paid in respect thereof."

At some date not later than the 4th of February, 1869, Mr. *Morton* agreed to become a shareholder in the company for twenty-five shares of £20 each, and he gave his cheque to the secretary of the company for £100, but this cheque was never presented to the bankers; nor was any payment ever made by *Morton* in respect of the shares.

On the 23rd of February, 1870, *Morton* transferred his shares to one *T. M. Gladstone*, and the transfer was duly registered, and *Morton's* name removed from the register of shareholders.

On the 15th of March, 1872, the company was ordered to be wound up. *Morton* was settled by the Chief Clerk on the list of contributories, and the question whether he ought to be so settled was now brought before the Court on an adjourned summons.

Mr. *T. A. Roberts*, for *Morton*, submitted that as he had ceased to be a member for more than a year before the winding-up commenced, and his name was not on the register at the commencement of the winding-up, he could not be liable as a contributory.

Mr. *Waller*, for the liquidator, submitted that as *Morton* had never paid one-fifth of the amount of his shares, he could not transfer them, and the transfer was null and void; and that it was unnecessary to make any formal application to rectify the register.

LORD SELBORNE, L.C.:—

Either a payment of £100 was made in respect of these shares or it was not. If the payment was made, the transfer was valid, and the liquidator's case wholly fails. If the payment was not made, the transfer was invalid, for the shares did not vest; but if the shares did not vest, the liquidator must fall back on an agreement to take shares. That agreement rested *in fieri*, and was capable of being discharged by a fresh agreement, as was decided in *Ex parte Beresford* (1); and the transfer which has been executed and registered operated as a new contract between the

(1) 2 Mac. & G. 197.

L. C. for M. R.

1873

MORTON'S CASE.

company, *Morton*, and *Gladstone*. *Gladstone*, in effect, came in and said, "I will take the shares instead of *Morton*," and both the company and *Morton* agreed to that. Unless that new contract is vitiated by fraud, of which I have heard nothing, the old contract with *Morton* is discharged, and he cannot be placed on the list of contributories.

Solicitors: Messrs. *Lewis & Lewis;* Mr. *G. J. Parson.*

In re YOUL.

V.-C. M.
1873
March 25.

Practice—Revivor—Petition—Death of Sole Petitioner—Lands Clauses Act—Payment of Costs to Executors.

A Petition for investment in real estate of a fund paid into Court under the *Lands Clauses Act*, presented by a person who had died after order obtained on the Petition, but before it had been worked out in Chambers, ordered to be revived on the application of the executors of the Petitioner.

THIS was a Petition by *William Finnerty Youl*, asking for the approval of the Court to a conditional agreement for the purchase of certain real estate by means of a sum of £800 paid into Court by a railway company for land taken under the *Lands Clauses Consolidation Act*.

An order was made on the Petition on the 26th of April, 1872, approving of the contract and directing a reference for title. On the 8th of February, 1873, the Petitioner died, leaving three persons his executors, and they obtained probate of his will shortly afterwards. The order on the Petition had not been fully worked out before his death.

Mr. *Lemon* now applied for an order to revive and carry on the Petition and order, and the proceedings under the same, under the names of the executors, and that they might have the benefit of the Petition, and order, and proceedings. He stated that a similar order had been made by the Master of the Rolls in 1867, in a matter of *In re Stagoll*.(1)

Sir R. Malins, V.C., directed a similar order to be made to that in *In re Stagoll*.

The order as drawn up ordered that the executors should be at liberty to carry on and prosecute the proceedings under the order in the same manner as the Petitioner might have done if he had not died, and ordered that upon the execution of the conveyance the costs by the order directed to be paid by the railway company to the Petitioner should be in lieu thereof paid to the applicants as such executors.

Solicitor: Mr. *Henry Gover*.

(1) W.N. 1867, 179: 15 W.R. 974

V.-C. M.
1873
April 26.

SOUCH *v.* EAST LONDON RAILWAY COMPANY.

[1872 S. 261.]

Railway Company—Notice to treat—Cul-de-sac—Public Street—Compensation.

16 L.J. 458

A railway company authorized to construct a line of railway under a public street is not bound to give notice to treat or pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street.

A *cul-de-sac* dedicated to the public is for this purpose in the same position as a public street.

The Plaintiff was the owner of a piece of ground with two rows of houses, which had existed more than twenty years, with a passage between them ending in a *cul-de-sac*, the whole of the soil of which was conveyed to him. A railway company, under the powers of their Act, gave notice to treat for some of the houses on each side, but the soil of the passage between the houses was expressly excluded from the notice. The railway was to be carried in a tunnel under the property. Evidence tending to shew dedication being given:—

Injunction to restrain the company from entering on the *cul-de-sac* without giving notice to treat dissolved.

THIS was a motion by the *East London Railway Company* to dissolve an injunction obtained *ex parte* in vacation, restraining them from taking a portion of a passage called *Victoria Place*, between two rows of houses belonging to the Plaintiff, without giving the usual notice to treat required by the *Lands Clauses Consolidation Act*, 1845.

The Defendant company were incorporated by the *East London Railway Act*, 1865, for the purpose of making a railway, part of which was to run by means of a tunnel under *Victoria Street, Shadwell.*

By a deed of the 16th of March, 1871, the Plaintiff had acquired the fee simple of a block of land of which he was previously a lessee. It comprised two parallel rows of eight houses, which had been built more than twenty years previously, and a passage sixteen feet wide, called *Victoria Place*, between the rows of houses, opening at right angles into *Victoria Street* at one end and closed at the other, so as to form a *cul-de-sac*. The description in the conveyance included the soil of the passage. Part of this block was within the compulsory powers of the company.

In the year 1872 the company were constructing their line along *Victoria Street*, and on the 14th of May, 1872, they served on the Plaintiff the usual notice to treat for the three end-houses on each side of *Victoria Place*, but the passage between the houses was expressly excluded from the notice, though it was quite impossible to construct the tunnel under the houses without continuing it under the passage.

The Plaintiff paid no attention to the notice to treat, and the company, desiring to take possession, obtained a valuation by a surveyor appointed by the Board of Trade, who fixed the value of the six houses at £820. This sum the company deposited in the *Bank of England* on the 5th of September, 1872.

The Plaintiff then required the company to undertake not to enter into possession of the passage, but they declined to give any such undertaking.

There was evidence that the local authorities in *Shadwell* had at the cost of the rates, since the year 1856, maintained and lighted a lamp in the passage, and had constructed a gully or drain down the centre, and that they never did so except in public streets.

It appeared from the evidence of the Plaintiff that there were two posts at the end of the passage, one in a position to prevent carts or carriages going up, and the other close to one of the houses, and intended, as the Plaintiff was informed when he purchased the property, to mark the boundary between the public and private property. It also appeared that as late as the 25th of January, 1872, the Plaintiff had received notice from the Board of Works for the *Limehouse* District, proper for the case of a private passage, requiring him to pave *Victoria Place* opposite some of the houses, and that he had done so. The Board of Works however, after the institution of the suit, disavowed the act of their officer, and stated that they had not intended to treat the passage as private property.

The bill was filed on the 10th of October, 1872, and an injunction obtained *ex parte* the next day, but the company did not make any attempt to dissolve it till their works were so far advanced that they were in a position to require to enter on the property almost immediately.

V.-C. M. 1873

SOUCH v. EAST LONDON RAILWAY CO.

After bill filed the company offered to pay £50 into Court, and before the motion came on they increased the offer to £100.

Mr. *Fooks*, Q.C., and Mr. *W. Fooks*, for the company:—

The company have clearly, by the *Railways Clauses Consolidation Act* (8 Vict. c. 20, ss. 6, 7, 13, 16) and their special Act, the right to take streets and places, subject to public rights of way, without compensating owners of land adjoining for the part of the street taken. Therefore the only question is whether a *cul-de-sac* is a street within the meaning of the Acts. In the special Act and in the *Railways Clauses Consolidation Act* there is no definition of a street. The best definition to be found is that in the *Metropolis Local Management Act*, 18 & 19 Vict. c. 120, s. 250, which clearly includes a *cul-de-sac*.

Mr. *Shapter*, Q.C., as *amicus curiæ*, referred to *Curling* v. *Austin* (1).

Mr. *Cotton*, Q.C., and Mr. *Alfred Bailey*, for the Plaintiff:—

The definition of the word "street" in the *Metropolitan Local Management Act* is made only for the purpose of management, not with reference to any question of property; and the sections of the *Railways Clauses Consolidation Act* referred to do not supersede the enactments of the *Lands Clauses Consolidation Act*, or enable the company to take property without paying for it. They simply provide compensation for public easements of rights of way. In the present instance the public have clearly no right of way. The passage is such as can only be used by the occupiers, and the posts at the end are a clear indication that there has been no dedication of the passage to the public. *Curling* v. *Austin* does not apply to the present case.

SIR R. MALINS, V.C., after stating and commenting on the facts of the case, continued:—

I was astonished to hear any argument going to the extent that a *cul-de-sac* is not just as much a public highway or public street as any other street. There are plenty of *cul-de-sacs* in *London*, such as *Ely Place*, *Bartlett's Buildings*, and *Thavies Inn*, in *Holborn*,

(1) 10 W. R. 682.

Stratford Place in *Oxford Street*, and *Stratton Street* in *Piccadilly*, each of which is just as much a public street as any street which is a thoroughfare. A *cul-de-sac* has frequently been decided to be a public highway, These houses have been built more than twenty years, and the passage has been left open to the public, who have been allowed to enter night and day whenever they thought fit. That amounts to a dedication to the public, and it makes a way or street so opened a public one. I apprehend, and I am perfectly clear in my opinion, that the company have just the same right over it as they have over any other street running out of *Victoria Street*, under which they are empowered to carry their line.

It is said that there were posts at the end, but that does not prevent its being a public way. They may have been put up to prevent carriages and carts from entering, and it may be a public way for foot-passengers though not for carriages. I do not express any final opinion, but so far as I have any opinion at present, I have no doubt that it is just as much a public way as any other street in the parish; and it follows that the company have as much right to make their tunnel or subterranean way under it as under any other public road or way, without paying compensation to anybody. In my opinion they clearly have that right. It is one which has been frequently acted upon, and no one has ever heard of any compensation being made for carrying a railway under any public highway.

The Act of Parliament prescribes what consents are to be obtained in such a case, and having obtained those consents the company pay no compensation, because the public is supposed to be compensated by the advantage they derive from the construction of the railway. It is obviously one of the greatest possible public benefits that railways should be constructed in a proper manner. The proper place and proper manner have been decided by the Legislature, and I am therefore bound to assume that this railway is a great public benefit.

The question then before me resolves itself into this: If this was a public way the company were right in not giving notice to treat for the site. If it is not a public way, but private property, the course they have taken would be wrong, and the Plaintiff may

V.-C. M. 1873 SOUCH v. EAST LONDON RAILWAY CO.

ultimately have to be compensated. But it is plain that a very small sum would be sufficient compensation. The company, before the motion came on, offered to pay £50 into Court to answer any liability, and they have offered this morning to make it £100, and I dare say if the Plaintiff had named £200 they would not have allowed that to stand in the way. If the Plaintiff would name a reasonable sum I would order it to be paid into Court, but as he will not do so, or take a reasonable view of his rights, I will dissolve the injunction, and allow him to take any course he can, because I consider his conduct in the last degree unreasonable and oppressive.

Solicitors: Messrs. *Bailey, Shaw, Smith, & Bailey;* Messrs. *Wilson, Bristows, & Carpmael.*

V.-C. M. 1873 *May* 3.

HAMILTON *v.* NOTT.

[1871 H. 84.]

Production of Documents—Correspondence between co-Defendants—Solicitor and Client.

The correspondence between co-Defendants after the institution of a suit is not, as a general rule, privileged from production; but where one Defendant, being a solicitor, has acted as agent for the solicitor on the record, to collect evidence in the suit, the letters passing between him and his co-Defendant are privileged communications.

THIS was a motion to discharge an order made in Chambers compelling the Defendant *William J. Humphrys* to produce the correspondence which had taken place between himself and his co-Defendant *John Nott.*

The suit was of this nature: Mrs. *Papendick*, a considerable landed proprietor in *South Wales*, by her will directed that there should be granted, as to part of her estate called the *Glasbury Farm*, a lease for life to *John Nott*, who was her bailiff, such lease to be granted upon the same terms as those upon which she let her farms to her other tenants; and she appointed *John Nott* and *William Humphrys*, since deceased, trustees of her will.

Mrs. *Papendick* died in August, 1864, and in the month of

March, 1865, *John Nott* caused a lease to be prepared, in pursuance of the will, by his solicitor, the Defendant *William John Humphrys*, who was the son, executor, and residuary legatee of *William Humphrys*, the co-trustee of *John Nott*; and it being considered that *J. Nott*, as trustee, could not grant a lease to himself, it was granted to *W. J. Humphrys* on his behalf. This suit was instituted in March, 1871, by the next friend of the Plaintiff Mrs. *Hamilton*, who was the representative of the testatrix, against *J. Nott* and *W. J. Humphrys*, for the purpose of having the lease corrected by inserting a reservation of the right of sporting over the farm, such reservation having, as the Plaintiffs alleged, always been introduced into all the leases made by Mrs. *Papendick* to her other tenants.

William Humphrys died shortly after the institution of the suit, and the Plaintiff required from the Defendants *John Nott* and *William J. Humphrys* the usual discovery of documents. The order for production was made in May, 1871, and the Defendants filed no fewer than ten insufficient affidavits.

In the tenth affidavit, filed in January, 1873, they mentioned for the first time that they had in their possession letters which had passed between themselves subsequently to the institution of the suit.

In a subsequent affidavit, filed on the 4th of March, 1873, the Defendants (while admitting that letters passing between two Defendants in the ordinary way were not privileged) stated that Mr. *Fortune*, their solicitor, had, for the purpose of obtaining evidence in the suit, constituted the Defendant *W. J. Humphrys* his agent, and consequently that, as he was agent of the solicitor on the record, all communications between *Nott* and *Humphrys* became privileged.

The question came before the Vice-Chancellor in Chambers, when His Honour made an order for the production of these documents, consisting of the correspondence between the two co-Defendants. The object of the present motion was to set aside that order.

Mr. *Pearson*, Q.C., and Mr. *Blackmore*, in support of the motion:—

The only question raised upon this motion is, whether the cor-

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respondence which passed between these two co-Defendants ought to be excluded from production. The object of the suit is to have a lease corrected by inserting a clause reserving the right of sporting over the land. One of the co-Defendants, *Humphrys*, is a solicitor, and he has been employed by the solicitor on the record to procure evidence in the suit. We therefore contend that, as agent for the solicitor on the record, his correspondence with the other co-Defendant is privileged from production. This principle has long since been established in the cases of *Steele* v. *Stewart* (1), *Hooper* v. *Gumm* (2), *Fenner* v. *London and South-Eastern Railway Company* (3), and *Minet* v. *Morgan* (4).

Mr. *Glasse*, Q.C., and Mr. *Marcy*, for the Plaintiffs:—

We do not dispute that correspondence passing between a solicitor or, in some cases, a solicitor's agent and the client is privileged; but under the circumstances of this case the correspondence is simply between co-Defendants, and cannot be protected. It was held in *Betts* v. *Menzies* (5) that letters passing between co-Defendants were not privileged from production, and this followed the case of *Goodall* v. *Little* (6), where the same principle was established.

These co-Defendants were not in the position of solicitor and client. It is true that up to the time of the institution of the suit the Defendant *W. J. Humphrys* acted as the solicitor for *John Nott*, but it is not on that account that the letters passing between them after the institution of the suit can be protected. It is of the greatest importance to the Plaintiffs to know what was the understanding between these Defendants as to the terms upon which the farm leases were always granted by Mrs. *Papendick*, and that would probably be disclosed by the correspondence we ask to have produced. There is no case here of solicitor and client; Mr. *Fortune* is the solicitor on the record for both the Defendants, and if he procured evidence through Mr. *Humphrys*, that does not bring *Humphrys* within the rule as to privileged communications. In *Steele* v. *Stewart* the circumstances of the case rendered it

(1) 1 Ph. 471.
(2) 2 J. & H. 602.
(3) Law Rep. 7 Q. B. 767.
(4) Law Rep. 8 Ch. 361.
(5) 26 L. J. (Ch.) 528.
(6) 1 Sim. (N.S.) 155.

necessary for the party or his solicitor to employ an agent in *India* to collect information in support of the legal proceedings; and in that case it was held that the communications of the agent to his principal relating to this evidence were privileged. But in this case there was no necessity for Mr. *Fortune* to have employed one of the co-Defendants as a solicitor to procure evidence. There was no need of any agent, but at all events he should not have selected Mr. *Humphrys* when there were many other solicitors at *Hereford*. A man has no right to take himself out of the rule applicable to all co-Defendants, and obtain protection for his communications, except by shewing that the necessity of the case is such that he is bound to employ one of the persons implicated in the charge. It cannot be shewn here that Mr. *Fortune* or Mr. *Nott* was bound to employ Mr. *Humphrys* as agent, and therefore the general rule must bind the Defendants, and production ought to be enforced.

Mr. *Pearson*, in reply.

SIR R. MALINS, V.C.:—

The question I now have to decide is, whether the order I made in Chambers for the production of the correspondence which passed between these two co-Defendants ought to be sustained or not.

The general rule that correspondence passing between co-Defendants after the institution of a suit, is liable to production, is not in dispute. No one questions the authority of the case of *Betts* v. *Menzies* (1), or the case of *Goodall* v. *Little* (2), decided by Lord *Cranworth*, upon which it was mainly determined.

In order to decide whether this correspondence ought to be produced, I must look at the position of the parties in this case. The trustees of the will of Mrs. *Papendick* were *John Nott* and *Wm. Humphrys*. *John Nott* and *Wm. Humphrys* were the persons to grant the lease to *John Nott;* but as it was considered that *John Nott* could not grant a lease to himself, the lease was granted to *Wm. John Humphrys*, the son of the trustee, in pursuance of the power given by the will. The lease was granted; and whether it was rightly or wrongly framed will have to be decided when the

(1) 26 L. J. (Ch.) 528. (2) 1 Sim. (N.S.) 155.

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cause comes to a hearing. The lease having thus been granted in 1865, this litigation arose in 1871. It is a singular thing that this being entirely a Principality case, the Plaintiff should come to *London* for her solicitor, and the Defendant should do the same. Messrs. *Masterman & Hughes* represent the Plaintiff, and Mr. *Fortune* represents the Defendant. Why it is that they neither of them employed a local solicitor in this Welsh case, I do not understand. Mr. *Fortune* being, then, the solicitor of the Defendant in *London*, requires a local agent or solicitor in the country to collect evidence upon the case, whether the right of sporting ought not to have been reserved in the lease, and he applies to a solicitor, Mr. *W. J. Humphrys*, who happens to be the son of Mr. *Nott's* co-trustee, resident in the city of *Hereford*. Consequently, as Mr. *Fortune* is the solicitor of Mr. *Nott*, and he employs as his solicitor or agent Mr. *Humphrys*, Mr. *Humphrys* becomes the solicitor or agent of the Defendant *Nott*. Now, under these circumstances, the question is, Ought the correspondence to be produced? I say, undoubtedly not; though, as a general rule, correspondence between co-Defendants must be produced. But, on the other hand, it is clearly settled that correspondence passing between a solicitor and client, or solicitor and agent, is protected from production. Nothing can be more clear or more firmly established than the rule laid down in the case of *Steele* v. *Stewart* (1), which is one of the most important authorities, and has been most carefully considered and always followed. It was followed by Vice-Chancellor *Wood* in the case of *Hooper* v. *Gumm* (2), and by the Court of Queen's Bench in *Fenner* v. *London and South-Eastern Railway Company* (3). It is therefore settled that wherever there is the relation of solicitor and client or solicitor and agent existing, that is, where correspondence is required to be produced from a person who has been employed as solicitor or agent for the Defendant, you cannot insist upon the production of that correspondence. In the present case it is distinctly proved, and it is not in dispute, that Mr. *Humphrys* was the agent of the solicitor, Mr. *Fortune*, engaged by the Defendant; and I am unable to discover any reason why he should not have acted in that capacity. Mr. *Glasse* says that there are plenty of other solicitors in the city of *Hereford*. No doubt

(1) 1 Ph. 471. (2) 2 J. & H. 602.
(3) Law Rep. 7 Q. B. 767.

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there are; but I know of no principle upon which Mr. *Nott* was obliged to go to a solicitor whom he did not know, when there was one whom he did know, and who was the son of his former co-trustee under the will. I can see no impropriety in *Wm. John Humphrys* being engaged as the solicitor or as the agent of Mr. *Nott;* and I am of opinion that the correspondence passing between him and Mr. *Nott* is, upon the principle of the case of *Steele* v. *Stewart*, protected from production. Therefore the motion to discharge the order will succeed so far as the production of documents goes.

As to the description of the documents, the description being "bundles of letters," my opinion is that this is insufficient, and they must be more sufficiently described. The order will be to discharge so much of the order made in Chambers as directs the production of these documents, and the costs of the application to be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Masterman, Hughes, & Masterman.*

Solicitor for the Defendants: Mr. *Fortune.*

LAZARUS *v.* CHARLES.

V.-C. M.
1873
May 5, 6.

[1873 L. 53.]

Registration of Designs Act (5 & 6 *Vict.* c. 100)—*Combination of Old Designs*—*Proprietor*—*Purchaser for Value.*

The Plaintiffs registered, under 5 & 6 Vict. c. 100, a design consisting of a double card basket, formed of a combination of two baskets, admitted to be separately old in design. The Plaintiffs were not the designers, but had contracted to purchase the articles in *Germany*, and imported them to *England*:—

Held, upon motion for an injunction to restrain the sale of an imitation basket, that the articles were not new or original within the meaning of the Act, and that the Plaintiffs, not being the designers, and not having purchased the design for value, were not entitled to the protection of the statute.

THE Plaintiffs were dealers in and importers of fancy goods under the style or firm of *Lazarus & Rosenfeld.* On the 6th of

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December, 1871, the Plaintiffs registered, pursuant to the Act 5 & 6 Vict. c. 100, a design of manufacture comprised in Class IV. of the said Act for the term of three years from the 6th of December, 1871. The design was designated as "a pictorial flap card basket," and described in the following way:—

"The case of the basket is formed by an octagonal piece of cardboard or other similar substance, and to each side of the octagon there are attached two pentagonal flaps, one above and the other below the octagonal base. These flaps can be folded down almost flat upon each side of the base, and by this means the entire basket can be packed into a box which is sold with the article. When the basket is required for use, the flaps are turned outwards till they are in contact at their edges, and are then connected by a cord passing through holes in each flap. Small medallion-shaped lithographs of objects of interest, or pictures, or verses enclosed in a medallion, are affixed to the inside of the upper set of flaps and to the outside of the lower set."

The Defendants carried on business under the style or firm of *C. Reynolds & Co.*, as importers of fancy goods. They had very recently applied to the ornamenting of numerous card baskets the Plaintiffs' design, or a design which was a colourable imitation thereof, and which they sold under the title of "Photo-medallion Card Trays." The Plaintiffs alleged that the sale of their card baskets had been injured by these imitation articles.

The bill therefore prayed that the Defendants might be restrained by injunction, during the residue of the Plaintiffs' copyright, from selling any of the photo-medallion card trays manufactured and sold by them, or any other article to which the Plaintiffs' design, or any colourable imitation thereof, was applied, or from otherwise infringing the Plaintiffs' copyright in the said design.

By the original bill and the first affidavit filed in support of the motion, the Plaintiffs stated that they were the proprietors of the design so registered by them; but by a subsequent affidavit they stated that they had seen the design in a shop at *Frankfort*, in *Germany*, and that they had entered into a contract with the designer and manufacturer, at *Frankfort*, to purchase from him the said baskets, which they imported into this country.

Mr. *Aston*, Q.C., and Mr. *Ludlow*, in support of the motion for an injunction:—

It is admitted by the Defendants that the articles sold by them are similar to our baskets, but they deny the novelty of our design. We do not claim any novelty in the design for a single basket, but for the peculiar combination of the two baskets—that is to say, one basket being turned over and the other basket being set upon it. This is, in fact, a basket with double flaps, the under flaps forming the stand and the upper flaps forming the basket. By this arrangement the flaps may be doubled up and the whole basket packed up in a box. The design is new and original within the meaning of the statute 5 & 6 Vict. c. 100, s. 5, and comes under Class IV., as extended and explained by the Act 13 & 14 Vict. c. 104, s. 8. That it is useful and ornamental no one can dispute. The Courts have never construed this Act in the same strict manner as the Act for the registration of patents; that principle was laid down in the case of *Harrison* v. *Taylor* (1); and in that case, as well as in *Norton* v. *Nicholls* (2) and *Reg.* v. *Firmin*, cited in argument in *Harrison* v. *Taylor* (3), and reported in the 15th vol. of "The Justice of the Peace" (4), it was held that a new combination of several old and known designs may constitute a new design capable of being protected under the statute. In *Holdsworth* v. *M'Crea* (5) it was held that the same nicety is not required in registering patterns or designs as in describing inventions under the patent laws; and where the Plaintiff claimed as his design a pattern of different parts, any one of which might be deemed a design, his registration of the whole pattern amounted to a claim of the combination, and could be protected, although each separate design might be old.

Mr. *Glasse*, Q.C., and Mr. *Ward*, for the Defendants:—

We submit that the Plaintiffs' design is neither new nor original, and that it is not a subject for registration under the Act. It is admitted that one basket in this form is old, and therefore two baskets must be old; but it is said that one basket set upon

(1) 4 H. & N. 815.
(2) 1 E. & E. 761.
(3) 3 H. & N. 304.
(4) Page 740.
(5) Law Rep. 2 H. L. 380.

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another basket is a new design. In the cases cited, where there was a combination of old and known designs in the formation of a new design, there was something meritorious and ornamental, and the decisions might have been justified; but this design is entirely without invention, and cannot come within the terms of the Act. The case of *Mulloney* v. *Stevens* (1) is exactly in point, for there Lord *Hatherley*, when Vice-Chancellor, refused to grant an injunction upon the application of the Plaintiff, who claimed in respect of a design formed of a combination of four old designs.

But there is another ground of objection to this motion—that the Plaintiff is not the designer of the article, nor is he the proprietor, as designated by the Act of 5 & 6 Vict. c. 100. The 5th section provides that the author of a new and original design shall be considered the proprietor thereof unless he shall have executed the design on behalf of another person for a valuable consideration, in which case such person shall be considered the proprietor. These Plaintiffs are not the designers, nor have they obtained the design for a valuable consideration. They only purchased the articles abroad and imported them to this country, as others might have done, and they are not in any sense proprietors of the design and had no right to register it under the Act.

Mr. *Aston*, in reply:—

The Plaintiffs have brought themselves within the Act by having entered into a contract to purchase these articles from the foreign designer and manufacturer. They have therefore become the proprietors for a valuable consideration, and are entitled to register the design. This is strictly a new and original design within the Act, since it is a new combination of two old designs, and as such it is entitled to protection under the authority of the cases already decided.

SIR R. MALINS, V.C.:—

This is a case of considerable difficulty, and, after reading all the affidavits and forming the best judgment I can, I cannot come to the conclusion that the Plaintiffs have established their right to an injunction. The article which the Plaintiffs have registered under

(1) 10 L. T. (N.S.) 190.

the Act 5 & 6 Vict. c. 100, is a card basket, which is admitted not to be in a new form as to the upper part, and the only novelty is that it is a double basket. In the form of the article I can see no novelty, for I am convinced you might find the same shape in half the fancy shops in *London*.

Now unless the design is new and original it cannot come within the statute, and although it may be pretty and ornamental, it is not on that account entitled to protection, and, as far as I am able to judge, I have come to the conclusion that it is neither a new nor original design within the meaning of the statute, and on that ground, if the case depended upon that alone, I should be adverse to the contention of the Plaintiffs; and though the Courts have shewn much more liberality in dealing with cases under the Act for registration of designs than under the Act giving protection by means of patents, yet the same principle applies as to patents, and people who manufacture articles with only a slight alteration in form from other articles already manufactured, should not rush into the mistake of registering their design, thus causing an embarrassment to trade. But there is another ground of objection: the persons who are entitled to protection under the 5th section of the Act (5 & 6 Vict. c. 100) are described in these terms: "The author of any such new and original design shall be considered the proprietor thereof, unless he have executed the work on behalf of another person for a good or a valuable consideration, in which case such person shall be considered the proprietor, and shall be entitled to be registered in the place of the author; and every person acquiring for a good or a valuable consideration a new and original design, or the right to apply the same to ornamenting any one or more articles of manufacture . . . . and also every person upon whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent but not otherwise." Therefore I take it that where a person is engaged in any ornamental business, and has a workman in his employ under him, who makes a design which is new and original, that design would become the property of his master by virtue of the relations that exist between them, and the master would be entitled to register the design under the words of

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the section: "Every person acquiring for a good or a valuable consideration, a new and original design, or the right to apply the same," &c. Here it is admitted that the Plaintiffs are not the designers of the article, and though they stated in the original bill that they were the designers, a different version is given of the Plaintiffs' right in their subsequent affidavit, and it now turns out that they saw the design in a shop at *Frankfort*, and that they brought it over to this country; but they state that they entered into an agreement with the manufacturer at *Frankfort* that they would purchase these baskets from him. This shews at once that the Plaintiffs are not entitled to any merit of invention; they only did as any one else might do, that is, they purchased the articles, but they gave no consideration to entitle them to be the proprietors of the design under the terms of the Act, for the agreement to purchase the articles from the manufacturer can form no consideration within the meaning of the statute. Therefore they are not the designers of the article, nor are they entitled to be the proprietors by virtue of having purchased the design for valuable consideration. That is, in my opinion, a fatal objection to the Plaintiff's title, and I do not think they were justified in filing their bill stating untruly that they were the proprietors of the design, and then contradicting the statement they at first made. They ought not to have stated that they designed the article when there was no evidence to shew how they became possessed of the design, or how long they had had it. The design was clearly public property long before they registered it under the Act, and it might have been purchased at *Frankfort*, and might now be in the possession of hundreds of persons in *England*. I cannot see, therefore, that the Plaintiffs have any merits whatever to entitle them to the injunction.

Then, what is the design which they say they were entitled to register? It is called "a pictorial flap card basket." They do not claim the right to the drawings which are placed upon the different pieces of card forming the basket, but they claim as proprietors of a design for a card basket made of cardboard, which is in fact nothing more than a combination of two baskets, one being set upon the other, and it is contended that this combination of two old designs entitles them to the protection afforded by the Act. It

is true that the cases of *Harrison* v. *Taylor* (1) and *Reg.* v. *Firmin* (2) have given an exceedingly liberal interpretation to the Act, and although there was nothing new in the designs yet the Court decided that a combination of old designs in one design constituted a new design within the meaning of the Act. I must take these decisions to be correct, and in cases precisely similar I should be bound to follow them; but I confess that I should do so with great reluctance, unless something novel were introduced in the combination. In *Harrison* v. *Taylor* there is this variation in the decision, that the Court expressed an opinion that there was no analogy between copyright in a design and a patent for an invention, and that it would not have been competent for the Plaintiff to register his design as against a person having a copyright in the pattern.

I rather think that this case is more similar to that of *Mulloney* v. *Stevens* (3), where there were four old designs respectively applied to three ribbons and to a button, and the three ribbons were then united by the button so as to form a badge, which was registered under the Act. Vice-Chancellor *Wood* held that this union did not amount to a new design within the statute, and an injunction to restrain the manufacture and sale of a similar combination was refused.

I am therefore of opinion that the Plaintiffs are not entitled, as the designers or purchasers of the design for value, to the protection of the Act, and have not brought their case forward in such a manner as to entitle them to an injunction; and that the article is not sufficiently new and original in design to be a proper subject for registration under the Act.

The motion must therefore be refused with costs.

Solicitor for the Plaintiffs: Mr. *G. Noon.*

Solicitor for the Defendants: Mr. *T. Angell.*

(1) 4 H. & N. 815. (2) Cited 3 H. & N. 304.

(3) 10 L. T. (N.S.) 190.

V.-C. M.
1873
May 26.

In re ADAIR'S SETTLED ESTATES.

Settled Estates Act—Copyholds—Sale as Freehold—Costs of Enfranchisement.

In an application for a sale of real estate under the *Settled Estates Act*, where the property proposed to be sold comprises copyholds as well as freeholds, the Court may direct that the copyholds be enfranchised before the sale, and the costs of enfranchisement paid out of the proceeds of the sale.

THIS was a Petition by a tenant for life of a settled estate to obtain a sale, under the *Leases and Sales of Settled Estates Act*, of certain portions of the estates comprised in the settlement.

When the sale was proposed it was believed that the whole of the property intended to be sold was of freehold tenure, but it had been recently discovered that some portions were copyhold. It was considered that the most beneficial way of carrying out the sale was to enfranchise the copyholds, sell the whole as freehold, and then pay the cost of the enfranchisement out of the proceeds of the sale.

The Petition accordingly prayed for an order to carry out this arrangement.

Mr. *Glasse*, Q.C., and Mr. *Cust*, for the Petitioners.

SIR R. MALINS, V.C., made the order accordingly.

Solicitors: Messrs. *Nicholl & Newman.*

CARR *v.* MORICE.

V.-C. M.
1873
May 26.

[1873 C. 121.]

Practice—Closing of Offices—Application before Bill filed.

Where, on account of the offices of the Court being closed, the filing of a bill has been delayed, the Court may grant an injunction before bill filed, and direct the bill and affidavit to be filed as on the day when the offices were closed.

ON Saturday, the 24th of May, Mr. *T. A. Roberts* applied *ex parte* to the Vice-Chancellor, at his residence, for an interim order to restrain a transaction on the *Stock Exchange*, which was to take place that day.

The Court and all the offices were closed on that day, on account of the celebration of Her Majesty's birthday, and consequently the bill and the affidavit in support had not been filed.

SIR R. MALINS, V.C., made the order retaining the copy bill, and on taking his seat the Monday following stated that in making the order he had felt bound to act as if the bill was filed before him at the moment the application was made. He therefore retained in his hands the copy of the bill produced to him, and now handed it to the Registrar, directing that it, and the affidavit in support, should be filed as on Saturday the 24th.

Solicitor: Mr. *John Holmes.*

V.-C. M.
1873
June 25.

THORNELOE *v.* SKOINES.

[1873 T. 64.]

Practice—Application before Bill filed.

In an urgent case an interim injunction may be granted before bill filed.

12 Ch D 633 In this case a motion was made *ex parte* for an interim injunction to restrain a sale. A draft bill had been prepared, and its statements verified by an affidavit; but it was stated that the sale was expected to be completed within an hour, and that there had not been time to prepare a copy of the bill for filing.

Mr. *Hemming*, for the Plaintiff, referred to *Carr* v. *Morice* (1), and asked for an interim injunction.

Sir R. Malins, V.C., gave leave to serve Defendant with notice of motion for the next morning at the sitting of the Court, and granted an interim injunction to restrain the receipt of the purchase-money on the Plaintiff giving, in addition to the usual undertaking, an undertaking to file the bill and affidavit in the course of the day.

Solicitors: Messrs. *Hensman & Nicholson.*

(1) *Ante*, p. 125.

WOODWARD *v.* PRATT.

V.-C. M.
1873
June 9.

[1871 W. 95.]

Practice—Married Woman—Evidence of no Settlement—Affidavit of Solicitor.

The Court will accept as evidence that there was no settlement on the marriage of a woman resident abroad an affidavit by a solicitor, disclosing facts which make it unlikely that there was a settlement, and stating positively that he was told by the lady and her husband that there was none.

THIS suit now came on for further consideration. One of the parties entitled to a share of a fund in Court was a Mrs. *Lydia Elphick*, the wife of *William Elphick*, who were now resident in the *United States* of *America*.

As evidence that there was no settlement on the marriage, an affidavit of *George Thomas Shaft*, a solicitor, was put in. He deposed that he was well acquainted with Mr. and Mrs. *Elphick*, and that they were connected with him by marriage; that he had been on very intimate terms with them and other members of the family for twenty-five years, and acted as their solicitor for the last ten years, and that they went to *America* in August, 1872, where they were still residing, as he knew from having had frequent communications with them by post. The affidavit then continued:—

"The said *William Elphick*, at the time of his departure from *England*, being in difficulties, authorized and instructed me, this deponent, to wind up his affairs and settle with his creditors, which I did; and upon receiving such instructions, and going into his affairs, I inquired of the said *William Elphick* and *Lydia* his wife whether there had been any settlement or agreement for a settlement made or entered into on or since their marriage; and they informed me, and I verily believe the same to be true, that there never had been any settlement or agreement for a settlement; and on several other occasions, after discussing family matters, the said *William Elphick* and *Lydia* his wife expressed their regret, on account of their financial difficulties, that there had not been any settlement made on their marriage, and, from my intimate

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WOODWARD v. PRATT.

acquaintance with the said *William Elphick* and *Lydia* his wife, I verily believe that no settlement or agreement for a settlement was executed upon or since their marriage.

Mr. *Cotton*, Q.C., and Mr. *Harvey*, for the Plaintiff.

Mr. *Macnaghten*, for other parties.

Mr. *C. T. Mitchell*, for Mr. and Mrs. *Elphick*.

SIR R. MALINS, V.C.:—

I think that may be considered sufficient evidence that there was no settlement on the marriage.

Solicitors: Mr. *John Richardson*; Mr. *W. Bristow*.

In re PRISON CHARITIES.

[1870 P. 117.]

V.-C. B. 1873 April 24, 25, 26, 30.

Lapsed Charity—"Poor Prisoners"—Education of Children—Cy-près—School for Children of Convicts.

Certain charitable trusts declared a century or two ago in favour of poor prisoners in the city of *London* having lapsed by reason of the abolition of the law of imprisonment for debt and the closing of debtors' prisons, the Attorney-General by a scheme proposed that all the funds should be treated as one charity, and applied to the building, establishment, and maintenance of a school for children of persons convicted of crime, and undergoing sentence:—

Held, upon the construction of the bequests, that by "poor prisoners" were meant prisoners for debt, especially the poorest and most sickly of such prisoners, and in all cases adults; and that there was no intention to relieve children, or to assist education:

Held, consequently, that the proposal did not approach sufficiently near to the charitable intentions of the donors to admit of the funds being applied *cy-près* in the manner proposed:

Held, further, that the proposed scheme would be unnecessary, as contemplating an object already partially or wholly, and better, provided for by the *Industrial Schools Act;* inconsistent with charitable intention, as tending to the relief of the public rates and taxes; and inexpedient, as resulting in the assemblage together in one establishment of children suffering under a common misfortune, and thus perpetuating the memory of that misfortune.

ADJOURNED SUMMONS.

On the 28th of June, 1870, an order was made by the then Vice-Chancellor, Sir *W. M. James*, upon a summons taken out on behalf of the Attorney-General, in the matter of "The Charitable Gifts for Prisoners following, that is to say, The Gifts of" (then followed a list of ninety persons, named or unknown donors), and in the matter of "The *Charitable Trusts Acts*, 1853, 1855, and 1860," directing all persons concerned to attend at the Vice-Chancellor's Chambers on the hearing of an application on the part of the Attorney-General that an inquiry might be made of what the property belonging to the said several charitable gifts for prisoners then consisted, and in what manner the same was invested or secured, and what was the annual income thereof; and that a scheme for the future management and regulation of the same, and for the application of the income thereof, might be

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settled by the judge. This summons was served upon the Corporation of *London*, and thirty-six other sets of trustees, being city companies, churchwardens and overseers of parishes, and others; of which some thirty-three appeared by their solicitors; and evidence was taken, the general result of which was to shew that in consequence of the abolition of debtors' prisons, and of imprisonment for debt, the charities for the relief of poor prisoners (which were very numerous, and had been founded at different dates in the course of the seventeenth and eighteenth centuries, with an income amounting in the aggregate to about £2760 a year) had failed; and that their funds were in many instances being accumulated by the trustees, or applied by them to purposes which they considered to be *cy-près* to the original gifts.

On the 8th of May, 1871, an order was made in the matters by Vice-Chancellor *Bacon*, directing inquiries and the settlement of a scheme, in the terms of the summons.

Under this order a scheme was prepared by the Attorney-General, which in its material features was as follows:—

"1. The charities for the relief of poor prisoners specified in the schedule hereto shall henceforth be amalgamated and considered as one charity. . . .

"2. The lands belonging to the said charities shall be vested in 'The Official Trustee of Charity Lands,' for all the estate and interest of the said charities, or any of them therein, and all funds belonging to the said charities, or any of them, shall be transferred to 'The Official Trustees of Charitable Funds' in trust for the said charity.

"3. The charity and the lands and property thereof shall be under the management and control of trustees, the full number of whom shall be fifteen. Six of the trustees, to be called the 'elective trustees,' shall be nominated as follows, that is to say—two of them by the mayor, aldermen, and citizens of the city of *London;* one by the said mayor, aldermen, and citizens, as Governors of *Christ's Hospital;* one by the *Drapers' Company;* one by the *Mercers' Company*, and one by the *Merchant Taylors' Company.* The remaining nine trustees, to be called the 'non-elective trustees,' shall be appointed by the Court of Chancery, or by some other Court or authority of competent jurisdiction.

"The following persons shall be the first non-elective trustees:" (blank spaces were left for the names).

"4. Death, resignation, refusing, declining, or becoming incapable to act, neglecting to attend any meeting of the trustees for one year, becoming bankrupt, liquidating debts by arrangement, or compounding with creditors, or ceasing to reside in or within twenty miles of the city of *London*, shall respectively be a disqualification from continuing to act as a trustee, and shall create a vacancy of the office held by the person so disqualified.

"5. On the occurrence of any vacancy among the 'elective trustees,' the trustees shall forthwith cause notice of the vacancy to be given to the body by whom the trustee whose office shall have become vacant was nominated, and such body shall, within the space of two calendar months thereafter, nominate another fit and proper person, residing in or within twenty miles of the city of *London*, to fill up the vacancy, in default whereof the right of such body to make such nomination shall lapse, and such office shall thenceforth be filled by a 'non-elective trustee,' to be appointed at the time and in manner hereinafter provided.

"6. When and as often as the number of 'non-elective trustees' shall by any of the means aforesaid have become reduced to four, fit and proper persons residing in or within twenty miles of the said city shall, under the direction of the Court of Chancery, or some other competent authority, be appointed to fill such vacancies, and the application for such purpose shall, unless the same be made by Her Majesty's Attorney-General, be made with the sanction of the Charity Commissioners for *England* and *Wales*. Application may, under special circumstances, be made for the appointment of additional 'non-elective trustees' before the number of 'non-elective trustees' shall have become reduced to four."

[Then followed clauses providing for the leasing and management of lands, for the appointment of a clerk and receiver, and a series of clauses providing for the holding of meetings and keeping of books.]

"26. After providing for any costs and expenses . . . . and providing the sinking fund hereinafter directed to be formed, the trustees shall apply the yearly income of the charity in the support of an industrial school, to which the children of parents (male or

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female) who have been sentenced to imprisonment or penal servitude shall have priority of admission.

"27. The trustees shall establish and maintain, subject and according to the provisions of this scheme, an industrial school for the reception, maintenance, clothing, education, and training of children of either sex; and children, one or both of whose parents shall have been sentenced to imprisonment or penal servitude, and shall be undergoing such imprisonment or penal servitude at the time of the admission of such children to the school, shall have priority of admission thereto.

"28. The trustees shall purchase a site for the said industrial school in or near *London*, and shall erect thereon suitable buildings for the school, with all necessary and proper residences for the master and matron thereof, and other conveniences, separate buildings being provided for the reception of boys and girls respectively; and shall fit up, furnish, and provide the same with all necessary and proper fittings, furniture, and conveniences for the above purposes. Such site shall be purchased under the direction and with the sanction of the Court of Chancery. . . . The total amount to be expended in the purchase of such site and the erection and fitting up such school buildings shall not exceed £8000.

"29. The amount required for the purchase of such site, and the erection and fitting up of such school buildings, shall be raised and paid out of the capital funds of the charity; and for the purpose of recouping to the charity the amount which shall be expended in the erection and fitting up of such buildings, 'The Official Trustees of Charitable Funds' and the said trustees shall annually set apart, out of the income of the remaining funds of the charity, a sum of money equal to one-thirtieth part of the money which shall have been so expended, and invest the same in the public funds to an account to be kept in the books of the trustees and of 'The Official Trustees of Charitable Funds,' and entitled 'The Sinking Fund Account;' and the dividends of the money so invested shall, as the same shall become due, be invested in like manner and accumulated until the money so expended shall have been entirely recouped to the charity, from which time the income of the accumulated fund shall be applied for the general purposes of the charity."

[Then followed clauses relating to the master and matron of the school.]

"38. The instruction to be afforded in the school shall be reading, writing, arithmetic, geography, and English history and literature; and each of the children admitted shall be taught some special industrial occupation, trade, or handicraft, in order to enable him or her, on leaving the school, to obtain an honest livelihood. The girls shall be taught plain needlework, and the children of thirteen years of age and upwards shall, so far as practicable, be employed in making clothes for the children, and in and about the general household duties of the establishment.

"39. Religious instruction according to the tenets of the Church of *England* shall be given by the master and matron respectively, at such times as he or she shall think best, by reading and explaining the Holy Scriptures to all the children, and suitable prayers taken from the Liturgy of the Church of *England* (to be approved by the trustees) shall be said every morning and evening in each school by the master and matron, or, in his or her necessary absence, by some assistant master or mistress; provided that no child, whose parent or parents shall object in writing on conscientious grounds, shall be compelled to be present when such religious instruction is given or such prayers are said.

"40. All children, male and female, of the age of six years and upwards, one or both of whose parents shall have been sentenced to imprisonment or penal servitude and shall be undergoing such sentence (unless unfitted by infectious disorder or other sufficient cause), shall, to the extent and capacity of the school, be capable of admission thereto and entitled to partake of all the benefits and advantages thereof. If a sufficient number of such children cannot be found, the trustees may admit the children of such persons as they shall consider to belong to the criminal class, or children who may, in their opinion, be in danger of becoming members of that class. No child shall be entitled to remain in the school after he or she shall have attained the age of fifteen years.

"41. The trustees shall, by advertising in the public newspapers, or by the employment of paid officers of inquiry, or by such other means as shall, in their opinion, be from time to time desirable, and the most likely to attain the object, ascertain what children

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of parents sentenced to imprisonment or penal servitude there are of suitable age to be admitted to the said school; and they shall cause the names and ages of such children, and such other particulars respecting them and their parents as the trustees shall think desirable, to be placed upon a register which shall be before the trustees at their meetings for the purpose of electing children to the school." . . .

Further evidence having been gone into, another summons was taken out on behalf of the Attorney-General, dated the 9th of August, 1872, to proceed with the scheme. This was served upon the corporation and the other sets of trustees who had appeared.

An appeal from this order, being an attempt to vary the scheme by excluding from its operation four of the *Christ's Hospital* Prison Charity Funds, on the ground that all the *Christ's Hospital* funds were the subject of a particular scheme then before the Endowed Schools' Commissioners, was, on the 19th of December, 1872, dismissed by the Lord Chancellor and the Lords Justices (1).

The scheme was accordingly proceeded with before the Chief Clerk, and was opposed by the five following sets of trustees, who also brought in rival schemes of their own under the order of May, 1871.

The Governors of *Christ's Hospital* were in possession of endowments, the aggregate income of which was about £373 a year, under seven foundations; one in 1583, founded by Lady *Mary Ramsey*, for the redemption of prisoners confined for debt in the city of *London* or *Southwark;* a second, in 1719, by the Rev. *Ferdinand Smithies*, for the discharge of prisoners for debt, for sums not exceeding £30; a third, in 1678, by *Thomas Stretchley*, for releasing prisoners in the then prisons of *Ludgate*, *Newgate*, and the *Wood Street* and *Poultry Compters*, and the *Fleet*, whose debts should not exceed 40*s.*; a fourth, in 1606, by the Rev. *John Laund*, for twelve of the poorest prisoners in the *Compter*, *Wood Street;* and three others for "poor prisoners" in one or some of the same five city prisons.

The scheme they proposed was briefly as follows:—That all the charities belonging to *Christ's Hospital* should be considered as one; that the property should be managed by the governors;

(1) Law Rep. 8 Ch. 199.

that separate minute books and books of account should be kept: and that the income should be applied towards the support or maintenance and education of the establishments of *Christ's Hospital* at *Hertford*, or in *London* or elsewhere, of children resident in the city of *London* or within the jurisdiction of the Board of Works, "whose parents, being persons of good character, have died, or by accident or special calamity have been deprived of means they might otherwise have possessed for maintaining their children, and for giving them an education higher than that given by the public elementary schools."

The *Mercers' Company*, whose funds amounted to about £616 a year, proposed that "the funds of the prison charities shall be appropriated for the support of convalescent hospitals; and—in the event of the Court being of opinion that it would be desirable that the said charities should not be amalgamated, but should be dealt with separately, or in groups—that the prison charities of which they were trustees should be applied for the support of such convalescent hospitals."

The *Merchant Taylors' Company*, whose revenue from the like sources, was about £170 a year, proposed that "the funds of the prison charities of which they are trustees, shall be appropriated to the maintenance and support of their convalescent home, situate at *Bognor*, in the county of *Sussex*, a scheme for which was duly sanctioned by the Charity Commissioners for *England* and *Wales* on the 26th day of March, 1872."

The *Drapers' Company*, with an income of about £188 per annum, proposed that this should be given to them to be applied to a school of theirs, called *Bancroft's School*, at *Mile End*.

The churchwardens and overseers of the parish of *Christ Church, Newgate Street*, were in this situation: *Edward Robinson*, goldsmith, by his will dated the 5th of December, 1711, devised a house in *Warwick Lane* to his nephew, his heirs, and assigns, for ever, subject nevertheless to and charged with a yearly rent of £5, of which £4 was to be paid yearly "for and towards the discharge of any poor inhabitant or housekeepers of the said parish of *Christ Church*, that shall be in custody or prison in the city of *London* for debt, to be paid to and disposed of by the four common councilmen of the four precincts of the said parish of *Christ Church*

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and their successors . . . for ever;" and the other £1 to the friendly society to which the testator belonged, "and now held at the *Feathers* alehouse in *Warwick Lane* aforesaid, for so long time as the same shall continue and be such a society, to be paid to the stewards of the said society for the time being, to be by them from time to time disposed of to the prisoners in *Ludgate* by five shillings per quarter." An information having been filed at the relation of *James Boyer* the elder, on behalf of himself and the other inhabitants and housekeepers in the parish, against *Robert Westwood* and others, by a decree made on the 19th of February, 1841, it was declared that "all poor persons living or residing within the parish of *Christ Church*, . . . whether rated to the relief of the poor, or lodgers or housekeepers where the landlord pays the rates, who shall be in actual custody or prison for debt, or who shall be in danger of being imprisoned or taken into custody under execution or otherwise for debt, or whose goods and effects shall be liable and in danger of being seized or taken in execution for debt, are entitled to the benefit of the annuity or yearly rent-charge of £4" in the will named, and also to the benefit of the income of £850 consols (the accumulations of the money); provided that the minister, churchwardens, overseers, and guardians of the parish should certify that the applicants were fit and proper objects; and it was ordered that the four common councilmen for the time being of the parish should be at liberty to appropriate and apply to the relief of such poor inhabitants or housekeepers so much of the £4, and of the income of the consols "as they may see fit, and occasion shall require, not exceeding in any one single or individual case one half of" the income for the time being. It appeared that the property of the charity now consisted of the rent-charge of £4 and a sum of £1950 consols; and the churchwardens objected to the charity being included within the scheme at all, on the ground that the direction contained in the above Chancery Order was still in force and had been from time to time acted upon; and that the applications for relief were frequent, and that to meet the whole of them would require a much larger sum than the charity had to dispose of.

The following is a summary of the evidence for and against the Attorney-General's scheme; that advanced by the above five bodies in support of their own proposals being immaterial:

Mr. *William Bayne Ranken,* Honorary Secretary to the *Discharged Prisoners' Aid Society* and to the *Newport Market Industrial School,* supported the scheme.

He said: "In my opinion no means would be so likely to conduce to that end (*i.e.* the amelioration of the criminal classes) as the establishment of industrial schools for the reception of children of criminals of either sex, by which means many of those children would be prevented from following the example of their parents." . . .

"As a rule the children of criminals are, during the incarceration of their parents, taken possession of by relatives and friends, most of them of the same class, and whose object it is to train up the children in the footsteps of their parents, utilising them in any manner so as to make them profitable to their self-appointed guardians.

"Considerable numbers of such children are, when qualified by crime and detection, sent to reformatory schools, but in the preventive or industrial schools there are very few; for it appears by the inspector's report for the year 1870 that out of 1827 children sent to schools in that year only 124 were the children of parents either criminal or destitute, and indeed at most of such schools there is an objection to take children of parents of the criminal class.

"Calculations have been made . . . . shewing that women sentenced to penal servitude on an average leave behind them annually seventy or eighty female children. But in addition to this number there are a very large number of habitual criminals sent to the county and borough gaols who also leave their children behind them similarly circumstanced." . . .

He further said there was great difficulty in finding schools willing to take the children in question; and as the Act dealt only with the children of female convicts, it left the larger number of children unprovided for, and especially no provision whatever was made for children under six years of age.

On the same side, Major *Edmund Frederick Du Cane,* Chairman of Directors of Convict Prisons, also deposed:—

"In order to check the development of the criminal class . . . it is of the first necessity to remove the children of criminal parents

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from the training by which they are likely to be brought within the ranks of the habitual criminal class.

"The necessity for some such measure as this has become of considerably greater importance, and is, in fact, of a pressing nature, now that we are deprived of the advantage of transportation, by which so large a number of criminals and their families have been removed from the country in former years, which, in my opinion, renders it necessary that the source of crime should be stopped at its outlet, as the only means by which we can hope to prevent the criminal class from largely increasing among us.

"A recognition of this necessity, and of the value of this mode of meeting the difficulty, has led to the enactment of a law by which the children of female convicts may be sent by a magistrate to an industrial school, and impending amendments of the law extend this provision to the children of male convicts.

"Industrial schools at present are mainly private establishments assisted by government contributions and subject to government inspection; but there is no such establishment which the officers of the law can by right require to take in inmates of the criminal class, and in order to enable the Act above referred to to be put actually in force, adequate means must be provided for the reception of these children in the numbers in which they undoubtedly exist, and this can only be done by some special establishment being erected for them.

"As some measure of the magnitude of this question, there are, at the present time, in the convict prisons in *England* and *Gibraltar*, 10,116 prisoners, of whom 1192 are females; and it cannot be doubted that, in educating and caring for the offspring of these, ample employment will be found for the funds which it is proposed by the scheme to devote to the purpose."

The Lord Mayor, Sir *Sidney Hedley Waterlow*, by an affidavit also in support, deposed as follows:—

"I have taken and still take much interest in the application of the disused prison charities of the metropolis. I believe it would be a great mistake to fritter them away in small sums by each set of trustees, and that their application as a homogeneous fund for the purpose to which the scheme of Her Majesty's Attorney-General proposes primarily to apply them, viz., as a school home for the

children of parents in prison, is one calculated to do much good as well to the recipients as to society, and is a more useful purpose to which to apply this fund than any other I am able to suggest."

On the other hand, the solicitor for the Governors of *Christ's Hospital* said that the governors objected to the scheme on these grounds: That the objects comprised in it were novel, that they necessitated an original establishment, with a large outlay for new buildings, and an expensive staff, for the execution of which purposes the income of all the funds put together would be inadequate; that there was no provision for any increase of funds; and that the Legislature had already provided industrial schools, whereby the class for which the scheme was contemplated could be provided for.

The solicitor for the *Mercers' Company* also stated that the scheme was opposed by that company, on the grounds that the support of the children of criminals had been by Parliament thrown upon the county rates, whereas the prison charities were founded to meet distress which could not, at the date of their foundation, be relieved out of the rates, or otherwise than by private benevolence; that the intention of the donors was to assist persons who by misfortune might become unable to help themselves, and not the children of criminals; that the objects of the charities were adults; and that the application of the funds to the establishment of industrial schools was not the nearest approach to the wishes of the donors that could be devised.

He also stated, that in 1870 a bill was brought into Parliament by the Corporation of *London*, intituled "A bill for making better provision for the administration and application of the Prison Charities of *London, Middlesex,* and *Southwark,* and for the establishment and maintenance of an Industrial School for destitute or vagrant children not convicted of crime, and for other purposes."

Part of the preamble of this bill was as follows:—

"And whereas an application of the prison charities would be highly beneficial which should provide means for the removal of children left destitute by imprisoned parents, and other destitute or vagrant children, from the dangers to which misery, social odium, and evil association may expose them, and for the prepa-

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ration of them for an industrial life profitable to themselves and conducive to the public good."

The 15th section of the bill provided for the establishment of an industrial school in the following terms:—

"The governors may establish and for ever maintain, subject and according to the provisions of this Act, an industrial school or industrial schools (each of which, if more than one, shall be deemed part of the school), with proper outbuildings, grounds, approaches, and conveniences, for the reception, education, and training of destitute or vagrant children of both sexes, not convicted of crime: and no children of any other class shall at any time be admitted thereto."

The deponent observed that the only difference between the scheme of the city of *London*, as stated by this bill, and the present scheme, as stated in par. 27, was, that by the bill the city of *London* proposed to provide for the education of destitute or vagrant children not convicted of crime, whilst this scheme provided for the education of children with a preference to those whose parents should have been sentenced to imprisonment or penal servitude.

He stated that the bill was opposed by many of the trustees of the prison charities, and, among others, by the *Mercers' Company*, the *Merchant Taylors' Company*, the Governors of *Christ's Hospital*, and the *Clothworkers' Company*, and was referred to a select committee of the House of Commons. The bill was opposed in committee on behalf of the above-named and other trustees; the chairman eventually declared the preamble not proved, and the bill was accordingly lost, no reason for its rejection being stated.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Vaughan Hawkins*, for the Attorney-General:—

The principle of the scheme is that funds which are intended for a class of prisoners which has ceased to exist should be applied for the benefit of another class of prisoners: *Attorney-General* v. *Hankey* (1). It will be objected that these charities were given

(1) 23rd November, 1867, unreported.

The facts of this case are briefly these:—*Frances Ashton*, by her will, dated the 30th of March, 1727, bequeathed an annual sum of £95 issuing

only to debtors, not to a criminal class of prisoners. But there is the authority of the case above mentioned; and it is to be observed, also, that in many (thirty-seven) instances the charity was for prisoners "in *Newgate*," a class which (though there was latterly a debtor's side to *Newgate*) were probably at the dates of these foundations criminal prisoners only, *Ludgate* being the prison then appropriated to debtors.

[Upon this point *Stow's London* (1) was referred to.]

The necessity for this school arises from the provisions of the *Industrial Schools Act*, 1866, and subsequent statutes (2).

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out of lands, "to be annually applied and disposed of for and towards the discharging out of prison such or so many poor prisoners as then should be prisoners in the prisons of *Ludgate* and the *Compter* in *Ludgate*, and the *Marshalsea* in *Southwark*," the amount of relief not to exceed £5 in each case. On the 27th of January, 1835, a decree was made on the hearing of the information. A scheme was prepared, whereby it was provided that the trustees should apply the said sum of £95 "in procuring the discharge of prisoners from the Queen's Bench and *Marshalsea*." By an order dated the 8th of August, 1848, the report of the Master, dated the 20th of July preceding, approving the scheme in the above particular, was confirmed; but on the 23rd of November, 1867, the scheme was ordered to be varied as to the above clause, and for the words "the Queen's Bench and *Marshalsea*" were substituted "any gaol or house of correction in *England* or *Wales*, or in aiding their families, or in aiding prisoners discharged from any gaol or house of correction in *England* or *Wales* to get back to their families or to procure work," and that for that purpose the trustees might avail themselves of the assistance of the Prisoners' Aid Society.

(1) 6th Ed. 1754, vol. i. pp. 19, 21; (but see p. 683).

(2) The *Industrial Schools Act*, 1866 (29 & 30 Vict. c. 118), enacts as follows:—

Sect. 5: "A school in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught, shall exclusively be deemed an industrial school within the meaning of this Act." . . .

Sect. 6: "Such one of Her Majesty's Inspectors of Prisons, as one of Her Majesty's principal Secretaries of State (in this Act referred to as the Secretary of State), from time to time thinks fit to appoint to be the inspector of reformatory schools, shall be also the inspector of industrial schools." . . . .

Sect. 12: "In *England* a prison authority may from time to time contribute such sums of money, and on such conditions as they think fit, towards the alteration, enlargement, or rebuilding of a certified industrial school, or towards the support of the inmates of such a school, or towards the management of such a school, or towards the establishment or building of a school intended to be a certified industrial school, or towards the purchase of land required either for the use of an existing certified industrial school, or for the site of a school

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Mr. *Miller*, Q.C., for the Corporation of *London*:—

The corporation support the scheme, on the understanding that the details of it are to be considered in Chambers.

Their view is that the original purpose having been one, that

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intended to be a certified industrial school." . . .

Sect. 14: "Any person may bring before two justices or a magistrate any child apparently under the age of fourteen years that comes within any of the following descriptions, namely, that is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale any thing), or being in any street or public place for the purpose of so begging or receiving alms; that is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence; that is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment; that frequents the company of reputed thieves. The justices or magistrate before whom a child is brought as coming within one of those descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school." . . .

Sect. 18: "The order of justices or a magistrate sending a child to a school (in this Act referred to as the order of detention in a school) shall be in writing signed by the justices or magistrate, and shall specify the name of the school. The school shall be some certified industrial school (whether situate within the jurisdiction of the justices or magistrate making the order or not), the managers of which are willing to receive the child; and the reception of the child by the managers of the school shall be deemed to be an undertaking by them to teach, train, clothe, lodge, and feed him during the whole period for which he is liable to be detained in the school, or until the withdrawal or resignation of the certificate of the school takes effect, or until the contribution out of money provided by Parliament towards the custody and maintenance of the children detained in the school is discontinued, whichever shall first happen."

Sect. 35: "The Commissioners of Her Majesty's Treasury may from time to time contribute, out of money provided by Parliament for the purpose, such sums as the Secretary of State from time to time thinks fit to recommend, towards the custody and maintenance of children detained in certified industrial schools." . . .

The *Habitual Criminals Act*, 1869 (32 & 33 Vict. c. 99) provides thus:—

Sect. 16: "The provisions of the *Industrial Schools Act*, 1861 (*), shall apply to all the children under the age of fourteen years of any woman who shall be convicted for the second time of any offence specified in the first schedule hereto, when such children shall, at the time of the conviction, be under her care and control, and have no visible means of subsistence."

The *Prevention of Crimes Act*, 1871 (34 & 35 Vict. c. 112) provides as follows:—

Sect. 14: "Where any woman is convicted of a crime, and a previous conviction of a crime is proved against

* Probably a misprint in the Act for 1866.

single purpose should be effectuated; that it is of the first importance that the funds should be kept together, and not scattered abroad in favour of a number of different objects.

No doubt the Commissioners of Endowed Schools might, under sect. 30 of their Act of 1869 (32 & 33 Vict. c. 56), have declared that it was desirable to apply these funds for the advancement of education, and they are still at liberty, if they please, to declare a scheme; but these funds have now, ever since May, 1871, been proposed to be dealt with by the Attorney-General.]

Mr. *Eddis*, Q.C., and Mr. *William Latham*, for the Governors of *Christ's Hospital*:—

The object of the Legislature in making the enactments they have made with regard to industrial schools, was to take such children as are here proposed to be dealt with, and to mix them with a better class. The principle of the present scheme is opposed to this notion. It is not *cy-près*; and it will relieve the public rates. The idea as to the refusal of the managers to take these children is wholly imaginary. Industrial schools are under the control of the Government; and the existing provisions do practically meet every case.

The leading idea of the founders was the relief of poverty and distress, not of crime. Hence the scheme is not *cy-près*.

Again, it proposes the formation of a totally new scheme, to the establishment of which the income is inadequate. The utmost that could be provided for would be twenty-two or twenty-three children.

[In support of the *Christ's Hospital* scheme they cited *Attorney-General* v. *Ironmongers' Company* (1).]

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her, any children of such woman under the age of fourteen years who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship, shall be deemed to be children to whom in *Great Britain* the provisions of the *Industrial Schools Act*, 1866 . . . apply; and the Court by whom such woman is convicted, or two justices, or a magistrate, shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the 14th section of the *Industrial Schools Act*, 1866 . . . in respect of the children in the said section described."

(1) Cr. & P. 218; 2 My. & K. 576; 10 Cl. & F. 908.

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The scheme is in substance the scheme of the corporation, who, finding Parliament unwilling to assist them, have had recourse to the Attorney-General.

Mr. *Kay*, Q.C., and Mr. *Macnaghten*, for the *Mercers' Company* :—

The scheme proposes to give these children a high-class education, and on this account is inapt and inappropriate.

The original intention was not education; and the charity was to be only for the poor, and not for criminals.

The Court has said that educational purposes are liable to abuse: *In re The Lambeth Charities* (1); *In re Stanes' Will* (2). Here the effect will be to brand with an indelible mark these unfortunate children, for whom the Legislature has made a different and a far better provision.

Mr. *Bristowe*, Q.C., and Mr. *Cookson*, for the *Merchant Taylors' Company* :—

Some of the existing industrial schools have in them children of criminals.

"Poor" prisoners must mean prisoners in custody for debt. The idea that criminal prisoners could file a bill for the application of these charitable funds is monstrous.

Mr. *Ince*, for the trustees of *Robinson's* charity.

Mr. *Sladen*, for the *Drapers' Company*.

The *Solicitor-General*, in reply :—

The objectors to the scheme should have given notice to the Attorney-General. The statutes that have been referred to are mere empowering statutes, nothing more. The schools which have been referred to as having in them children of criminals are reformatories, not industrial schools. There is no evidence to contradict that of Mr. *Ranken* and the others. If it be a reason against the establishment of an industrial school that it will relieve the rates, then, since the passing of the *Elementary Education Act*, 1870 (33 & 34 Vict. c. 75), every appropriation of charity

(1) 22 L. J. (Ch.) 959. (2) 21 L. T. (O.S.) 261.

funds to education must fail. The statutory provisions are inadequate; and even if put in force, they would not do what the Attorney-General proposes to do.

As to *cy-près:* at the time when these charities were founded imprisonment for debt was inflicted as a punishment; insolvency was then treated as a crime.

The objection on the ground of the injury which would be done to the children is purely imaginary.

April 30. SIR JAMES BACON, V.C.:—

The application which has been made to the Court arises out of a summons taken out by Her Majesty's Attorney-General for the purpose of procuring a direction for the application of a considerable number of charitable trusts originally declared in favour of poor prisoners for debt, and which, by the changes which have been made in the law, and by force of other circumstances, can no longer be applied strictly and directly according to the intentions of the donors and founders of the several trusts. By the order made on the hearing of the summons, an inquiry was directed as to the particulars of the several trusts, and the funds subject to those trusts, and the amount of their annual income; and it was ordered that a scheme or schemes for the future management of the charitable gifts for prisoners, and for the application of the income, should be settled. The particulars have been ascertained, and the aggregate annual income of the charities may be stated, for the present purpose, at something more than £2700.

The Attorney-General has carried into Chambers a scheme by which he proposes that the whole of the funds should be treated as one charity, and be applied to the building, establishment, and maintenance of a school for the reception, education, training, clothing, and maintenance of children of both sexes of persons convicted of crimes and undergoing the sentences which may have been pronounced upon them. To this scheme objections have been taken by the existing trustees of several of the charities, each of whom, besides opposing the Attorney-General's scheme, propose modes in which, as they insist, the charity funds, either in the whole or in part, ought to be applied. The first question, and

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indeed the only one which can be disposed of on the present occasion, is the scheme of the Attorney-General. Several affidavits have been filed in support of that scheme by persons whose means of knowledge on the subject are extensive, and whose motives in urging its adoption cannot be otherwise than purely benevolent.

[His Honour read extracts from the above-mentioned affidavits of Mr. *Ranken*, Major *Du Cane*, and the Lord Mayor, and continued:—]

Upon the grounds stated in those affidavits it has been argued that, the object of the Attorney-General's proposal being to supply a public want, and to accomplish a purpose beneficial to the whole community, it ought to receive the sanction of the Court; and it has been insisted that the power of the Court in carrying into effect what is called the *cy-près* doctrine is without limit or qualification; and that, since it has been found and determined that the original purposes of the several charitable gifts cannot (as unquestionably they cannot) be fulfilled, it is competent to the Court to direct the application of the funds to any other charitable purpose of which the Court may approve. On the part of the objectors this principle is not disputed. But it is admitted only with this qualification, that the Court, in applying the *cy-près* doctrine, will be guided by some analogy to the original destination of the funds, and will not depart from the purpose and object of the donors, unless it be wholly impossible to carry those purposes and objects into effect.

This subject has been on many occasions considered by the Court, but on none more carefully and elaborately than in *Attorney-General* v. *Ironmongers' Company* (1), which, in its several stages, was the subject of repeated discussion, and occasioned much diversity of opinion among Judges of the greatest experience and eminence. The charitable gift there was for the redemption of Christian captives in *Barbary*—a gift which wholly failed, because, by the events which had happened since the death of the testator, there were no such captives for whose benefit it could be bestowed, and it was ultimately applied in supporting and assisting charity schools in *England* and *Wales*.

(1) Cr. & P. 208; 2 My. & K. 576; 10 Cl. & F. 908.

Lord *Cottenham*, when Lord Chancellor, expressed the principle by which his judgment was guided thus (1): "There is necessarily great latitude in exercising the jurisdiction over charity funds where the direct object of the donor fails; and therefore very different opinions may be formed upon that subject in the same case. A charity may be *cy-près* to the original object, which seems to have no trace of resemblance to it, but which may be very properly adopted if no other can be found having a nearer connection." In the House of Lords the same Judge in the same case said (2): "*Cy-près* means as near as possible to the object which has failed." And Lord *Lyndhurst*, speaking of the testator in that case, said (3): "We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding with our opinion of those charitable inclinations. You cannot talk of his intention with respect to something that he never contemplated. The true mode is, to consider what he did, and from what he did to collect what were his inclinations with regard to charity."

These expressions, which I believe have never been questioned, appear to me to be the authority and the guide by which questions like the present ought to be considered and determined.

The Corporation of *London* alone, among the several charities, has been heard in support of the scheme.

The opponents are somewhat numerous—some of them insisting upon the application of the whole of the charity funds to other purposes; or, at all events, that the charities of which they are the present trustees should be excluded from the scheme. Thus *Christ's Hospital*, whose share of the aggregate income of the funds is upwards of £373 per annum, propose that the entire fund shall be under their management, and shall be applied for the education and maintenance of children, to be admitted by them to their existing establishment up to the age of fifteen years, giving to such children an education higher than that given by the public elementary schools in *London*.

The *Merchant Taylors' Company*, whose share of the aggregate fund exceeds £180—having by the expenditure of a large sum

(1) Cr. & P. 227. (2) 10 Cl. & F. 922.
(3) 10 Cl. & F. 924.

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of money of which they were trustees (called *Donkyn's* fund), established a convalescent home at *Bognor*, under the sanction of the Charity Commissioners, in which they provide thirty-five beds—desire to provide twelve more beds, whereby the usefulness of their institution would be very beneficially increased, and claim to have the whole income applied to this purpose.

The *Mercers' Company*, the income of whose trust funds is about £600 per annum, propose that the whole of the income shall be appropriated to the support of convalescent hospitals; but if such entire income shall not be amalgamated, then that the prison charities of which they are trustees shall be applied for the support of such convalescent hospitals.

The *Drapers' Company*, who are the trustees of *Bancroft's* school for the education of 100 poor boys, and whose share of the income of these charities is about £180, propose that this fund should be applied by them in providing for the admission to their school of day scholars, in addition to the 100 boys already on the foundation.

The churchwardens of *Christ Church, Newgate Street*, are trustees of a sum which, by accumulation, has become £2000 consols, out of which the sum of £4 per annum is at present applicable for the discharge of any poor person in prison for debt; and they desire to retain the application of that fund under an order formerly made.

Although the several charities I have mentioned take different views as to the future application of the funds of which they are trustees, they all agree in opposing the Attorney-General's scheme. The grounds of their opposition may be stated to be twofold. First, they say that the scheme is in itself open to objection, because it does not so resemble in its nature the charitable intentions expressed by the several donors as to justify its adoption, in accordance with the principles which this Court has always regarded in applying the *cy-près* doctrine, for that there are many other objects more analogous to the charitable designs of the donors; and, secondly, they say that the scheme is in itself objectionable in its nature, and ought not to be sanctioned by the Court.

It is clear that the intentions of the donors, one and all, were to

relieve a particular, and unfortunately too well known, description of human misery, and that, besides the relief which it was intended to give to poor persons imprisoned for debt, the selection was to be made of the very poorest, and in some cases of the most sickly, and that the objects of the charities must in all cases be adult persons. It was suggested by the Attorney-General that the gifts in favour of poor prisoners might properly include poor criminal prisoners, and this because *Newgate*, which was a prison for criminals, is mentioned in some of the wills. But I do not think it open to doubt, upon the true construction of the bequests, that prisoners for debt were the only prisoners meant by the donors, or that *Newgate* was, and had been for centuries before the building of *Whitecross Street* prison, a prison for *London* debtors. Certain it is that no trace is to be discovered of any intention to afford relief to children or to encourage or assist education—nor, indeed, of any other intention than to relieve pressing, urgent, immediate want, by freeing the objects of the bounty from the thraldom and enforced idleness of a prison, and restoring them to that liberty which would enable them to gain their livelihoods by their labour. I am satisfied, therefore, that, without undertaking to specify in what particular manner the charity fund ought to be applied (as indeed it is no part of my duty to do on the present occasion), the funds may be applied in a manner much more consonant to the intentions of the donors than by building a house and erecting an establishment for the education and maintenance of such a limited number of children as is now proposed. I say this with a full conviction that the project of the Attorney-General might in some degree relieve present misery, and perhaps prevent future crime; but I must add that I have not found any instance in which the Court has applied charity funds *cy-près* to the founding and building of a totally new establishment.

The second head of objection which has been urged appears to go to the very substance of the scheme. It is first said that it is unnecessary, for that the law has already made a provision for the cases to which the scheme relates. Industrial schools for the education, training, and maintenance of children of the lowest class of society, in their origin supported by voluntary contributions, have

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been long established and are numerous. Their usefulness has been recognised by the Legislature; provisions are made for their assistance by the State when they shall have been certified by the Home Secretary; and the prison authorities are by the 29 & 30 Vict. c. 118, empowered to contribute to the establishment and support of such schools, and even to the building of such schools when intended to be certified. Children found begging, or vagrant, or orphan, or whose surviving parent may be undergoing imprisonment, or children frequenting the company of reputed thieves, or juvenile offenders under the age of twelve years, may be sent by an order of justices to certified industrial schools, the managers of which shall be willing to receive them, and there detained for the periods limited by the justices' order; and, by subsequent Acts, children under fourteen years of age, and having no visible means of subsistence, of a woman twice convicted, may in like manner be sent to certified industrial schools. The opponents of the scheme say that to accede to it would be to apply the charity revenues in aid of taxes and rates; and it is certain that whatever support may be given to an industrial school under the certificate of the Secretary of State, must be given by the Treasury, and that so much as may be contributed by the prison authorities must be borne by the local rates. Reference has been made to a bill which was brought into Parliament by the Corporation of *London* for the same object as that which is proposed by the scheme, but which bill was rejected by the Committee of the House of Commons, and the opponents ascribe the support given by the Corporation of *London* to the present scheme to a desire on their part to avail themselves of the scheme to accomplish the object which they failed to obtain by their bill, and so to escape the payments which otherwise might have to be defrayed out of the rates. Although no such intention can be imputed to the Attorney-General, it is indisputable that the application of the charity funds to the purposes of the scheme would have the effect of relieving, *pro tanto*, demands which might otherwise have to be borne by rates and taxes. It has been further urged by the opponents that the amount of the charity funds, considerable as they are, will, when the necessary deductions shall have been made for building, for the expenses of management, and for other incidental expenses, leave an annual income insuffi-

cient to provide for more than a very limited number of children —an objection which, if it stood alone, would not be conclusive.

The main objection to the scheme of the Attorney-General appears to me to be, that it departs entirely from the intention of the founders of the charities, and that it is not shewn, and I have no reason for thinking, that, although the funds can no longer be applied for the relief of poor prisoners for debt, they may not be applied usefully, and beneficially, and charitably, for the relief of adult sick and poor persons, the misery and want of whose condition were undoubtedly the inducement of the several donors to make their several bequests. Nor do I doubt that such an application is that which the rule of the Court prescribes in such cases.

Notwithstanding the benefit which would be conferred by providing for the industrial eduçation of the children of criminals, I cannot but think that it is of most questionable policy to form an exclusive or special establishment for such children, and thereby perpetuate the memory of the misfortune to which their infancy was exposed by the crimes of their parents; for although it may be true that, upon their leaving the school, masters and employers might be found for them, it is no less certain that the fact of their being certified and marked as the children of criminals cannot be advantageous to their future progress in the world. Nor do I consider it is a sufficient answer to this objection that the State has already established reformatory schools for children convicted of actual crime. It is said that there is an objection on the part of managers of some industrial schools to admit to them the children of criminals, but no instances of the existence or prevalence of such an objection have been furnished on this occasion, while the statutes I have referred to seem to contemplate it as practicable, at least, that the orders of the justices for committal to industrial schools of very young criminals, and of children who are in the way of becoming criminal, would be obeyed. And such a mode of dealing with them would be the more effectual, because the justices' order would ensure the detention of the children in the schools—a power which would and must be wanting in the scheme. If it were adopted, there is nothing to prevent criminal parents from withdrawing their children from the projected school.

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Upon the whole, I am of opinion, for the reasons I have given, that I am not at liberty to adopt the scheme of the Attorney-General in its present form; and as the suggestions made by the several opponents of their views as to the proper application of the charity funds are not now before me, I have purposely forborne to express any opinion upon them.

The following are minutes of the order:—

This Court being of opinion that, in settling a scheme or schemes for the future management and regulation of the funds belonging to the said charitable bequests for prisoners, such funds ought not to be applied towards the establishment of an industrial school for children of convicted persons.

Order that it be referred back to Chambers to consider a scheme or schemes in pursuance of said order dated the 8th of May, 1871.

Costs of all parties appearing to be costs in the matters.

Solicitor for the Attorney-General: Mr. *Fearon.*

Solicitor for the City of *London:* Mr. *T. J. Nelson.*

Solicitor for *Christ's Hospital:* Mr. *Maberly.*

Solicitor for the *Mercers' Company:* Mr. *Watney,* Jun.

Solicitor for the *Merchant Taylors' Company:* Mr. *S. Fisher.*

Solicitor for *Robinson's Charity:* Mr. *Eagleton.*

Solicitors for the *Drapers' Company:* Messrs. *Lawford & Waterhouse.*

JAMES *v.* JAMES.

L. J. J. for V.-C. W. 1873 March 8.

[1872 J. 9.]

Equitable Mortgagee by Deposit—Foreclosure.

The relief to which an equitable mortgagee by deposit is entitled is foreclosure, not sale.

Pryce v. *Bury* (1) followed.

THIS was a bill for an account by an equitable mortgagee against the heir-at-law of the mortgagor, and for a foreclosure or sale, and the only question was whether the Court ought to direct a foreclosure or a sale.

Mr. *W. W. Karslake*, for the Plaintiff, stated that there were numerous cases which were easily reconcilable, but the weight of authority seemed to be in favour of Lord *Eldon's* view, that a foreclosure was the relief to which an equitable mortgagee was entitled: *Pryce* v. *Bury* (1).

(1) L. C. & L. JJ. 26th January, 1854.

Extract from Mr. Registrar *Colville*, Junr.'s note book, p. 48, with his marginal notes:—

"PRYCE *v.* BURY.

"*Cooper*, for the Plaintiff, the mortgagee.

"*Frederick Bury*, the Defendant, the mortgagor, is the Appellant to the whole decree."

N.B.—Question as to costs of the surrender of the copyholds—Whether mortgagor bound to bear those costs? Decree below directed mortgagor, in default of payment, to be foreclosed, and so convey estate to mortgagee. This is the main point, but the Defendant having opened the whole decree, this lets in Plaintiff to ask a variation in decree by obtaining a lien on both moieties of estate.

V.-C. *Kindersley* dismissed bill as to one moiety.

John Wm. Bury is dead since.

Mr. *Cooper*, for Plaintiff, proceeds.

N.B.—V.-C. had held that the moiety of which *John Wm. Bury* was tenant in tail in remainder, and in which his brother had a contingent interest, was subject to the mortgage on ground that brother had joined in memorandum of deposit.

N.B.—*John Wm. Bury* being dead, both parties, viz., Mr. *Cooper* and Mr. *Glasse*, agree that *Frederick Wm. Bury* is now admitted tenant for one moiety of the estate, and that no one since *John Wm. Bury's* death has been admitted as to his moiety, but that *Frederick Wm.* is entitled to be admitted.

Mr. *Glasse*, in answer to a question of Lord Justice *Bruce*, says he intends now to insist that *John William's* moiety is not charged beyond his life interest. This afterwards abandoned by Mr. *Glasse*.

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Mr. *Pemberton* appeared for the heir-at-law, and referred to *Tuckley* v. *Thompson* (1).

The LORD JUSTICE JAMES read the note from the Registrar's book of *Pryce* v. *Bury*, on appeal to the full Court, and said that that case was conclusive on the question, as appeared by that note, which ought to be reported. Decree for foreclosure accordingly.

Solicitor for the Plaintiff: Mr. *Cotterell.*
Solicitors for the Defendant: Messrs. *Meynell & Pemberton.*

As to form of decree, Mr. *Cooper* cites *Price* v. *Carver* (*Milne*, p. 157—Copyhold); *Ball* v. *Harris*, p. 497; 8 *Simons*; *Hill* v. *Price*, *Dickens*' Error, in report corrected in *Seton* from Regrs. Lib.

Not called on to support his case as to Frederick William's moiety or as to the £100.

Mr. *Glasse*, for the Defendant *Frederick Wm. Bury*, *Bibbey* v. *Shufflebotham*.—Sir *J. Leach*, 8th May, 1843.

De Gex with Mr. *Glasse*.

Parker v. *Housefield* commented on; also form of decree settled by Lord Eldon in an equitable mortgage.

N.B.—The Judges here consider that the law is now settled that the rights of an equitable mortgagee, by deposit of title-deeds, is foreclosure, not sale.

Cur. proceed on Saturday.

Saturday, 28th January.

N.B.—See form of decree also in a copyhold case as drawn by F. R. B. Court considered form right.

THEIR LORDSHIPS (all three) were unanimous in dismissing the appeal and affirming decree of Court below, thereby establishing the rule, as it would seem, that in a bill by mortgagee in an equitable mortgage, Lord *Eldon's* view that, in case of non-payment of mortgage-money, the order should go on to direct mortgagor to convey, and next that the direction for him to convey implies that he is bound to do all necessary acts at his own expense to complete such conveyance, is right.

Here it was held that he must procure himself to be admitted tenant of the copyhold, and pay the fines and fees. (See this decree, *Seton*, p. 444; R. H. L. pp. 443, 449.)

(1) 1 J. & H. 126.

Ex parte LLANSAMLET TIN PLATE COMPANY. *In re* VOSS.

C. J. B. 1873 March 10, 17.

Breach of Contract—Measure of Damages—Goods to be delivered by Instalments —Non-delivery—Forbearance of Buyer—Bankruptcy—Proof.

A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be twenty tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries :—

Held, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made.

Ogle v. *Earl Vane* (1) distinguished.

THIS was an appeal from a decision of the Judge of the County Court at *Swansea*.

John Matthew Voss carried on business at *Swansea* as an iron manufacturer under the name of the *Yspitty Company*. On the 11th of May, 1871, he entered into the following contract with the *Llansamlet Tin Plate Company* :—

"*Yspitty Works*, 11 May, 1871.

"Dear Sirs,—In reply to your favour of this date, we have much pleasure in confirming your proposal to take 150 tons of best coke bars in trucks at our works at £7 15*s*. per ton, and 150 tons of common iron black plate at £14 2*s*. 6*d*. per ton, in trucks here also ; delivery to be 20 tons of each per month.

"Yours very truly,

"For the *Yspitty Company* and self,

"*J. M. Voss*."

The deliveries were not duly made under this contract. In some months there was no delivery made, and in others the delivery was deficient.

(1) Law Rep. 2 Q. B. 275.

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On the 18th of January, 1872, *Voss* filed a petition for liquidation by arrangement, and a trustee was afterwards appointed. When the petition was filed there remained to be delivered under the contract ninety-five tons of coke bars and 129 tons of black plate. The price of iron had risen considerably, and the *Llansamlet Company* claimed to prove in the liquidation, by way of damages for the breach of the contract, for a sum equal to the difference between the contract price and the market price at the date of the filing of the petition.

The sum claimed was £895 5*s*. The trustee rejected the claim as excessive, on the ground that the proof could only be made as to the deficiency in each monthly delivery for the difference between the contract price and the market price at the end of the month in which the delivery ought to have been made. Application was then made to the Judge, and he made the following order:—

"It is ordered that the proof of the *Llansamlet Company* be rejected for the amount claimed, and that an account be taken of the quantities of best coke bars and common iron black plates agreed to be delivered at the times stated in the agreement dated the 11th of May, 1871; of the quantities actually delivered at those times; of the quantities purchased by the *Llansamlet Company* to supply deficiencies, and the prices paid for the same, and the difference between the contract price and the market price of the day when the purchases were made to supply deficiencies. And this Court doth declare that the *Llansamlet Company* are entitled to prove against the estate of *J. M. Voss* for the difference between the contract price and the market price of the day at the respective times of short delivery or non-delivery of best coke bars and common iron black plates under the said contract when no purchases were made by the *Llansamlet Company* to supply deficiencies, and for the difference between the contract price and the prices paid when purchases were made by the *Llansamlet Company* to supply the said deficiencies, after giving credit for any sum that may be due from the *Llansamlet Company* to the estate of *J. M. Voss*."

It appeared from the evidence that the *Llansamlet Company* had

bought some bars of iron in the market from time to time in consequence of the non-delivery under the contract. It appeared also that shortly before the liquidation petition was filed the *Llansamlet Company* had pressed for the delivery of what then remained due under the contract, and that *William Jones*, the manager of *Voss's* works, had offered to deliver some iron bars then lying at the works in part fulfilment of the contract, but that as trucks could not be obtained these bars were never delivered. In an affidavit which was made by *Jones* he stated that the short deliveries and non-deliveries under the contract were "for the convenience and advantage, and by the desire and actual request, of the *Yspitty Company*;" but on cross-examination *Jones* admitted that no such request had in fact been made. *Voss* made an affidavit, in which he stated that the sole reason for not delivering the quantity of iron contracted for was his inability to manufacture the same.

The *Llansamlet Company* appealed from the decision of the County Court Judge.

Mr. *De Gex*, Q.C., and Mr. *Beresford*, for the Appellants:—

This case is governed by *Ogle* v. *Earl Vane* (1). We ought not to suffer by the indulgence we have given to the vendor. We were not bound to go into the market at the end of each month to buy the deficiency in the delivery of that month; it was a mere chance whether the price would rise or fall. If the price of iron had fallen, the trustee could still have compelled us to fulfil our contract. The principle laid down by Baron *Martin* in his charge to the jury in *Ogle* v. *Earl Vane* exactly applies.

Mr. *Bristowe*, Q.C., and Mr. *Wilberforce*, for the trustee:—

The evidence that the company went into the market and bought iron shews that there was no contract of forbearance on their part as in *Ogle* v. *Earl Vane*. The *onus* is on them to shew affirmatively that they waited for the convenience of the vendor, and this they have not shewn. On the contrary, there is negative

(1) Law Rep. 2 Q. B. 275; Ibid. 3 Q. B. 272.

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evidence that they did not wait. One instance of their going into the market to buy is enough.

Mr. *De Gex*, in reply:—

According to *Ogle* v. *Earl Vane* (1) there need be no contract of forbearance. It is clear that the postponement was for the vendor's convenience, and therefore the damages ought to be assessed on the footing of our having to buy the iron at the market price when the petition was filed.

Sir James Bacon, C.J.:—

There is no doubt that the case of *Ogle* v. *Earl Vane* is a very important one upon this subject. The question arises whether what was done there ought to be done here.

In *Ogle* v. *Earl Vane* the case as to the contract was very plain. It was a contract to be completed within the then present quarter from April, 1865; and it was one entire contract. There was no performance of it at all in the interval of that quarter. The correspondence set out in the report shews that the vendors were unable to perform their part of the contract, and that they made a variety of excuses, and in some of the letters asked for a substitution of a different kind of iron in completion of their contract. Nothing came of that negotiation. Then the day arrived when the contract, which was one entire contract for partial deliveries, was totally broken. The purchasers insisted that they were entitled to recover damages for the contract broken. On the other side it was said: "The utmost amount of your damages is the difference between the price at which at the time of the breach you could have bought in the market that iron which we contracted to give you, and which we did not give you, at the contract price; and you ask for more than that." Now the summing up of Mr. Baron *Martin* on the trial (which is quite consistent with everything which was said in the course of the judgments in the Court of Queen's Bench and in the Court of Error) seems to me to comprise the whole case. He told the jury that (2) there was no other contract but the original bought and sold notes (and so it was subsequently decided), and he added, "When the time comes

(1) Law Rep. 2 Q. B. 275. (2) Law Rep. 2 Q. B. 278.

to complete a contract to supply goods, and the vendor says, 'I cannot deliver,' the damages are the difference between the market price when the contract is broken and the contract price. But if the vendor holds out that he will be able to deliver at some future time, and the vendee waits accordingly, there is no fresh contract, but the circumstance may be taken into consideration in ascertaining the damages, when the vendee goes into the market on the vendor turning out unable after all to deliver the goods." That was left to the jury, and the jury found a verdict for the larger amount, for more than the market price at the time when the contract was broken. The question was, whether that was a right direction to the jury, and that question went to the Queen's Bench and afterwards to the Court of Error.

I am at a loss to discover any resemblance between that case and the present. I have no doubt about the law as there laid down. But here I find a contract to deliver a number of parcels of iron of two different qualities, the deliveries to take place periodically during a period extending from May, 1871, to January, 1872, which period expired at or about the time when the liquidation proceedings were commenced. That the contract was broken is quite clear; what was done is quite clear; and that distinguishes the case from *Ogle* v. *Earl Vane* (1). The evidence shews that the vendees went into the market, not when the insolvency of the vendors happened, but from time to time as they required it, and bought some iron; and as to that they have a right, on the clearest principles, to claim as a debt the difference between the price they contracted to pay and that which they were obliged to pay to some other vendor. There was no such purchase in *Ogle* v. *Earl Vane*. Even if there had been, still that would have been, as Baron *Martin* said, a matter for the jury to take into consideration upon all the circumstances of the case. Now all the circumstances of this case, as they were presented to the learned Judge whose decision is now appealed from, were these: the breaches from time to time of the contract; the fact that the purchasers had provided themselves in the market with some iron at a price higher than the contract price; and that when the liquidation proceedings were commenced a very considerable quantity of iron still remained to be

(1) Law Rep. 2 Q. B. 275.

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supplied. But it was also in evidence that, immediately before the liquidation petition was presented, a demand was made by the vendees for the iron, some of which ought to have been long ago delivered, and that a conversation then took place between *Jones* and Mr. *Williams*, the agent of the company. Mr. *Williams* asked if he might have some iron which was then visible on the premises, and Mr. *Jones* said, "Yes, you can have it; and if you will send trucks for it, you may take it away;" or something to that effect. The trucks were not sent, and there was no delivery of that iron. It has been suggested that Mr. *Jones* had no authority to do that, and that that could have no effect upon the contract. In my opinion Mr. *Jones* as manager had full authority then and there to deliver to Mr. *Williams*, if he chose to accept it, the iron which he pointed out, in performance and satisfaction, so far as it would go, of the contract then subsisting between them. That Mr. *Williams* would have accepted it if he could have got the trucks, is, I think, also clear. That there was forbearance on the part of the purchasers is also clear on the evidence. But it is in dispute whether the forbearance took place at the request of Mr. *Voss;* upon that there is a conflict of evidence. It is said on behalf of the trustee that the forbearance was simply an omission to insist upon the delivery; that it was very convenient, no doubt, to Mr. *Voss* that the delivery should not take place, because he was engaged in carrying out some more lucrative business; but that there was no other forbearance than that. I think that is proved by the facts of the case, and I need not trouble myself to reconcile what Mr. *Jones* said at one time with what he said at another, because the facts speak for themselves. Then, this being the state of things, the proof tendered by the *Llansamlet Company* for £895 was rejected by the trustee as excessive, and upon the issue joined on that proof the matter goes before the Judge. Now, assuming for one moment that *Ogle* v. *Earl Vane* (1) applies to this case (though in my opinion it does not apply at all), and adopting what Baron *Martin* said to the jury in *Ogle* v. *Earl Vane*, let me assume that was in the mind of the learned Judge of the County Court when he decided this case, and that, taking into consideration all those circumstances which have been insisted upon, he was of opinion,

(1) Law Rep. 2 Q. B. 275.

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acting as a jury (for that is a part of his function), that the justice of the case required him to give a verdict, first to ascertain and settle the particulars which are mentioned in the inquiry which he directs, and then to make an order to prove for what should be the result of that inquiry. That is not inconsistent with *Ogle* v. *Earl Vane* (1). What is it the learned Judge has directed? He deals with the fact, which was passed over very much in the argument, that it is suppressed from the account which accompanied the proof, what the difference was between the contract price and the market price when the purchases were made from time to time, and the proof was rejected for the amount claimed, because there was not any evidence to justify it. For want of those materials the Judge directed the account mentioned in the order to be taken. How can justice be done in a case of this sort, except by such an inquiry being made? *Ogle* v. *Earl Vane* does not, as I have already said, in my judgment, apply to this case, because that was a case of an entire contract and an entire failure. There was nothing whatever done to disturb the entirety of those two ingredients. Here, at the end of the first month, there was a right to the performance of the contract; there was a similar right at the end of every succeeding month. The parties went on dealing with each other, and insufficient quantities were supplied and accepted without objection by the purchasers, and it was not until January, 1872, that it was ascertained how much on the whole the supply had been deficient for the completion of the contract. Then, if it could be said that, beyond the market-price to be ascertained in the mode which the learned Judge has pointed out, there was still additional damage which the purchaser might claim, that, in the words of Mr. Baron *Martin*, would be a question for the jury. Then, admitting that there was forbearance on the part of the purchasers—admitting that it was an advantage to the vendor, that it was a convenience to him, and that it was at his request—a forbearance for which he was to pay—the learned Judge who had to assess the damages has thought right to ascertain them by means of the account which he has directed. He has, in my judgment, done nothing at variance with the decision in *Ogle* v. *Earl Vane;* he has decided according to the strict

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justice of the case, and his order must, as far as I am concerned, be affirmed, and this appeal must be dismissed with costs (1).

Solicitor for the Appellants: Mr. *W. M. Hacon*, agent for Mr. *C. Norton, Swansea.*

Solicitors for the Trustee: Messrs. *Tamplin, Taylor, & Joseph*, agents for Messrs. *Strick & Bellingham, Swansea.*

(1) An appeal was brought from this decision, and was argued before the Lords Justices on the 25th of May, 1873. WN(1873)165

Mr. *Lindley*, Q.C., and Mr. *Beresford*, appeared for the Appellants.

Mr. *Bristowe*, Q.C., and Mr. *A. Williams*, for the trustee.

Sir W. M. James, L.J., said:—

It appears to me that the County Court Judge could not have come to a different conclusion from that at which he arrived. There is not a particle of evidence of forbearance on the part of the purchasers at the request of the vendor. In *Ogle* v. *Earl Vane* there was some evidence to go to a jury. The orders of the County Court Judge and the Chief Judge were quite right, and the appeal must be dismissed with costs.

Sir G. Mellish, L.J.:—

I am of the same opinion. The only question is whether the County Court Judge came to a right conclusion on a point of fact after having the witnesses examined before him. I see no reason to differ from him.

HOLLIER *v.* BURNE.

[1866 H. 134.]

L. C. for M. R. 1873 May 9, 23.

Ecclesiastical Leaseholds—Bequest—Trust for Renewal—Ecclesiastical Commissioners—Purchase of Reversion—Surrender of Lease as to part of Leasehold—23 & 24 Vict. c. 124, ss. 20, 35, 37, 39.

A testator bequeathed specifically leaseholds held under a dean and chapter to trustees upon trust for a tenant for life, with remainders over. The will contained directions amounting to a trust for renewal overriding the interest of the tenant for life, and also an absolute power of sale in the trustees. The reversion became vested in the Ecclesiastical Commissioners, who refused to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest and payment of a sum of money. The tenant for life opposed the acceptance of such proposal, on the ground that her income would be greatly diminished:—

Held, that the proposed arrangement was within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the Court had power to direct it to be carried into effect; and an inquiry was directed whether the proposed arrangement was proper and beneficial, having regard to the value of the leasehold property and the right of the remaindermen under the will to succeed, upon the death of the tenant for life, to the enjoyment as nearly as might be of the corpus of the same property to the income of which the tenant for life was entitled during his life.

THIS was a suit for the administration of the trusts of the will of *Peter Dowding*, dated the 17th of December, 1834. The testator thereby bequeathed specifically a leasehold property in *Somersetshire*, held under a lease from the Dean and Chapter of *Bristol*, which had been renewed every seven years, to trustees upon trust for his daughter, Mrs. *Kent*, during her life for her separate use, without power of anticipation, and after her death (in the events which happened) for her four children in equal shares. The will contained the following clause:—

"Provided always, and I hereby authorize my said trustees and trustee for the time being, out of the rents and profits of the said leasehold premises hereinbefore bequeathed, to retain and set apart the sum of eighty pounds every year until the same shall amount to the sum of five hundred pounds sterling, and to lay out and invest the same from time to time in their or his names or name in some of the government stocks or funds of *Great Britain*, and to pay the interest and the dividends thereof to the

L. C. or M. R. 1873 HOLLIER v. BURNE.

person or persons for the time being entitled to the rents and profits of the said leasehold premises until the said sum of five hundred pounds shall be required for the purpose of paying the fines and expenses for obtaining a renewed lease of the said leasehold premises respectively to be held upon the trusts aforesaid. And in case the said sum so set apart shall at any time prove insufficient, then I direct the person or persons for the time being entitled to the rents and profits of the said leasehold premises, out of the said rents then due, or otherwise, to make up the deficiency. And in case there should be any surplus, then I direct the same to be retained by my said trustees or trustee until the same, with the future sums to be retained as aforesaid, shall amount to the like sum of five hundred pounds, to be invested and held upon the trusts aforesaid, so that there may be at all times an accumulating or sufficient fund for the purpose of renewing the lease of the said leasehold premises as often as occasion may require."

The will also contained an absolute power for the trustees at their discretion to sell the leasehold property, or any part thereof.

By a codicil dated the 16th of November, 1836, the testator charged the leasehold property with an annuity of £50 per annum in favour of Mr. *Kent* (his daughter's husband) in case he should survive her.

The testator died in 1844. This suit was instituted in 1866, and now came on to be heard upon further consideration, and a question arose as to what should be done with reference to the leasehold property under the following circumstances:—

The property in question consisted of a rectory, glebe lands, and tithe rent-charge, the quantity of land in the lease being 78A. 3R. 37P., and the tithe rent-charge amounting to £200 per annum. The rent and other annual payments reserved by the lease amounted to £33 per annum, the lessees being also liable to repair the chancel of the parish church. The lease had, since the death of the testator, been more than once renewed, and the last renewal took place in 1860. The estates of the Dean and Chapter of *Bristol* had since become vested in the Ecclesiastical Commissioners, who declined to grant any further renewal, but were willing to sell to the trustees under the will part of the property, consisting of 73A. 3R. 15P. of land, and £18 19*s.* per annum

of tithe rent-charge, on the terms of a surrender of the existing lease (which had about eight years to run) in the remaining 5A. 0R. 22P. of land, and £181 1s. of tithe rent-charge, and of the payment of a sum of £2620 (with interest at 5 per cent. from the 1st of April, 1872) by way of equality of exchange; the property surrendered to the Commissioners to be liable to the repairs of the chancel.

The fund in the hands of the trustees applicable to the renewal of the lease amounted only to £1040, and the balance of the £2620 would have to be raised out of the trust estate.

Mr. and Mrs. *Kent* were both living, the latter being about sixty-seven years of age.

It was stated at the bar that the effect of the proposed arrangement with the Ecclesiastical Commissioners would be to reduce the annual income of Mrs. *Kent* from £300 to £90.

Mr. *Fry*, Q.C., and Mr. *Charles Hall*, for the Plaintiff, who had married a daughter of Mrs. *Kent* since dead, and was her legal personal representative, asked that the proposals of the Ecclesiastical Commissioners might be carried into effect, or, at all events, that an inquiry might be directed whether these proposals were such as a prudent owner of the fee simple would accept. They pointed out that the trustees had an absolute power of sale over the leasehold property, and submitted that the proposal was in effect to sell part of the property, and to mortgage the remainder.

Sir *R. Baggallay*, Q.C., and Mr. *Woodroffe*, for Mr. and Mrs. *Kent*, referred to sects. 36, 37, and 38 of the Act 23 & 24 Vict. c. 124, and contended that the proposal could not be carried into effect against the will of the tenant for life, or, at all events, to her detriment: *Hayward* v. *Pile* (1).

[They also referred to *In re Wood's Estate* (2).]

May, 1873. LORD SELBORNE, L.C., after stating the facts as to the state of the title and the proposed agreement with the Ecclesiastical Commissioners, continued:—

Mrs. *Kent*, the tenant for life, whose income would be much

(1) Law Rep. 5 Ch. 214. (2) Law Rep. 10 Eq. 572.

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reduced by this transaction, would prefer to run her life against the existing lease, and she objects (so far as she is entitled to do so) to the proposed arrangement. The trustee either objects or is passive; but the Plaintiff (with the concurrence, as I understand, of the other remaindermen under the will) desires that the terms offered by the Ecclesiastical Commissioners should be accepted, and the question which I have now to consider is, whether the Court ought to make any order with a view to the preservation for the remaindermen of so much of the value of this portion of the trust estate as may be capable of being preserved by means of this or any other arrangement with the Ecclesiastical Commissioners.

After considering the provisions of the testator's will, and the 20th, 35th, 37th, and 39th sections of the Act 23 & 24 Vict. c. 124, I am of opinion that the Court has power to direct the trustee under the will to carry this or any similar arrangement with the Ecclesiastical Commissioners into effect, if, upon due consideration of the rights of all persons interested under the will, it should appear just so to do. So far as relates to that part of the property the reversion of which is proposed to be conveyed by the Commissioners to the trustee, and the payment of the £2620, the transaction will be a purchase by the trustee authorized by the 20th and 35th sections of the Act; so far as relates to the surrender of the leasehold interest in the residue of the land and rent-charge as part of the consideration for this purchase, it will be a sale authorized, in my judgment, by the power of sale contained in the will; or, if the transaction ought rather to be regarded as in the nature of an exchange, it would, I think, be authorized by the 39th section of the Act. Under the 20th section, the £1040 renewal fund will be applicable towards payment of the £2060, or of any other sum which may become payable to the Commissioners, and any deficiency for this purpose, and for meeting the expenses of the transaction, may be raised by sale or mortgage of the 73A. 3R. 15P., and the £18 19*s.* rent-charge, under the 35th section, and, if necessary, of such other lands (if any) as are subject to the same trusts, under the 37th section of the Act.

18 Ch D 87

Assuming that the best bargain which can be obtained is made with the Commissioners, upon terms which it would be wise and beneficial to accept, if the interests were not divided between a

tenant for life and remaindermen, the question remains whether the Court can interpose its authority to carry through such an arrangement without injustice to the tenant for life. It is not immaterial to remember that, by the general law of the Court, if a perishable or terminable estate, such as a lease or an annuity not perpetual, is settled by will upon a tenant for life with remainders over, the tenant for life is not entitled to enjoy this kind of property in specie without an express direction for that purpose; it must, in the absence of such a direction, be converted into money, in order that the corpus of the same subject, of which the tenant for life is entitled to receive the income, may pass unimpaired, upon the cessation of the life interest, to the remaindermen. When a testator by his will contemplates and provides for the perpetual continuance of church leaseholds settled upon a tenant for life with remainders over, by a series of renewals, his purpose evidently is not that the tenant for life should receive any benefit at the expense of the remaindermen, but that the remaindermen should succeed in due course to the enjoyment of the same property of which the tenant for life is entitled to the income. If the trust for the renewal is absolute and overrides his interest, the tenant for life is not entitled to object, on the ground of the reduction of his income, to any arrangement in lieu of renewal which may be made under the provisions of the Act of Parliament, when renewal ceases to be possible, so long as the best practicable terms are obtained. The property purchased from the Commissioners at the price agreed upon represents, under these circumstances, the permanent or capitalized value of the trust property, for the purpose of that succession of interests which the testator intended.

Looking then to the will of the testator in this case, my opinion is, that it contains as to these leaseholds an absolute trust for renewal, prior and paramount to the interest of the tenant for life. A particular mode of setting apart and keeping up a renewal fund is provided, but if the sums so set apart should at any time prove insufficient, the testator has directed that the deficiency shall be made up by the persons or person for the time being entitled to the rents and profits "out of the rents then due or otherwise;" and he has also expressly declared his will to be "that there shall be at all times an accumulating or sufficient fund for

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the purpose of renewing the lease as often as occasion may require."

I think, therefore, that I ought to direct an inquiry in Chambers whether the arrangement now proposed (or any modification of it to which the Commissioners may be willing to agree) is proper and beneficial, having regard to the value of the leasehold property and to the right of the remaindermen under the will to succeed upon the death of the tenant for life to the enjoyment, as nearly as may be, of the corpus of the same property to the income of which the tenant for life is entitled during her life; and if so, what sum it will be necessary to provide for that purpose, and for any expenses incident thereto, in addition to the fund accumulated for renewals under the will, and how such sum ought to be raised and provided.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Robinson & Preston.*

L. C. for M. R. 1873 *May* 28.

HARDWICK *v.* HARDWICK.

[1865 H. 112.]

Will—Devise—Falsa Demonstratio—Misdescription as to Locality and Occupation.

1 Ch. D. 697 74 6 Ch. D. 441

Testatrix devised "all that my share and interest in the lands known by the name of *D.*, situate in the parish of *K.*, now in the occupation of *E.*"

The lands known as *D.* included two small closes in the parish of *L.*, but only accessible from the rest of the lands, which were in the parish of *K.*; also one close formerly in the same occupation as the other land, but at the date of the will and the death of the testatrix occupied by *M.* There was no residuary devise:—

Held, that these three closes passed under the devise.

MARY TAYLOR by her will, made in 1860, devised a portion of her real estate to her trustees upon certain trusts, by the following description:—"All that my farm and lands situate at *Hodghurst*, in the parish of *Church Stretton*, now in my own occupation, and all that my cottage and garden at the *Lower Wood*, now in the occupation of *Robert Muir*."

The testatrix devised the other portions of her real estate to her

trustees upon certain other trusts, by the following description:— "All that my share and interest in the messuages, lands, and premises called or known by the name of the *Dyffrydd* and the *Little Dyffrydd*, situate in the parish of *Kinnerley*, in the county of *Salop*, now in the occupation of *John Edwards*, also my estate and interest in certain messuages, lands, and hereditaments situate at *Picklescott*, in the said county of *Salop*, in the occupation of Mr. *Thomas Rogers*."

There was no residuary devise.

The question arose, on further consideration of a suit for the administration of the estate of the testatrix, what lands were included in the devise of the interest of the testatrix in *Dyffrydd* and *Little Dyffrydd*. With respect to this property, the particulars of which were set out in the second schedule of the Chief Clerk's certificate, the Chief Clerk certified as follows: "Parts of the property described as *Dyffrydd* are situate in the parish of *Llandisilio*, in the county of *Montgomery*, and are, except where they respectively abut on the river *Virnwy*, surrounded by, and are thrown into, and form part of, enclosures in the parish of *Kinnerley*, in the county of *Salop*; there are no boundaries between such parts of the said lands in the said two counties respectively. Such parcels of land in the parish of *Llandisilio* have for forty-one years been deemed, and reputed, and occupied as part of the lands and premises known as *Dyffrydd*, and were at testatrix's death in the occupation of *John Edwards*, the then tenant of the said property called *Dyffrydd*, and are now in the occupation of *Thomas Jones*, the present tenant of *Dyffrydd*."

"Down to the year 1815 *Paper Mill Meadow*, in the said schedule mentioned, was occupied as part of the *Dyffrydd Farm*. At that time *William Taylor*, the then owner of *Dyffrydd*, who had previously farmed the said *Dyffrydd Farm*, took a neighbouring farm called *Knock-in-Heath*, and let *Dyffrydd Farm* to *John Edwards*, the present tenant. *Taylor* retained *Paper Mill Meadow*, as convenient to hold with the said farm called *Knock-in-Heath*, and after his death *Morris* succeeded to the tenancy of the *Knock-in-Heath Farm* and the said *Paper Mill Meadow*, which he at the date of the testatrix's will, and at the time of her death, and subsequently, to the present time, still holds therewith."

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The question was, under these circumstances, whether the lands situated in *Llandisilio*, consisting of two closes, which were misdescribed in the will as to locality, and *Paper Mill Meadow*, which was misdescribed as to its occupation, passed under the devise in which the Plaintiffs and some of the Defendants were beneficially interested.

Mr. *Roxburgh*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiffs:—

Under this devise the whole of the testator's land at *Dyffrydd* and *Little Dyffrydd* passed to the Plaintiffs, notwithstanding the partial misdescription. The Chief Clerk's certificate shews that the two pieces of land which are situated, not in the parish of *Kinnerley*, but in that of *Llandisilio*, formed part of the *Dyffrydd Farm*, and were only accessible from the other part of the farm, except where they abutted at a river. In the case of *Paper Mill Meadow* the error is as to the occupation only, not as to the locality. These, we submit, are not such misdescriptions as will invalidate the devise.

In *Goodtitle* v. *Southern* (1) it was held that a devise of "all that my farm called *T.*, now in the occupation of *A. C.*," was not necessarily limited to the lands in *T.* in the occupation of *A. C.*, but might be shewn by evidence to extend to other lands in *T.* not in his occupation. So in *Down* v. *Down* (2), a devise of "my farm and lands called *C. Farm*, situate in or near the parishes of *D.*, *W.*, and *T.*, now on lease to *F.*," was held to pass a close in the parish of *D.*, part of *C. Farm*, and formerly occupied under the same lease, but for thirty-three years occupied by the owner, and excepted out of two leases of *C. Farm*, one of which was prior to the devise. These two cases are direct authorities in the Plaintiffs' favour as regards *Paper Mill Meadow*.

In *Doe* v. *Earl of Jersey* (3), a devise of "all my *B. F.* estate and all the land of which it consists," which estate was subsequently described in the will as being in the county of *G.*, was held to include land known as part of the *B. F.* estate, though situated in another county. This case applies to the closes in the parish of *Llandisilio*. In *Paul* v. *Paul* (4), a devise of lands at *C.* in the

(1) 1 M. & S. 299.
(2) 7 Taunt. 343.
(3) 1 B. & A. 550.
(4) 1 W. Bl. 255.

tenure of *A. B.* were held to include woods and timber excepted in the lease to *A. B.*, the words "in the tenure of *A. B.*" being merely words of additional description.

Mr. *Southgate*, Q.C., and Mr. *Stock*, for Defendants in the same interest:—

When there is first a particular description of the property which is the subject of the devise, as in this will, "all my share and interest in the lands called or known by the name of *Dyffrydd* and *Little Dyffrydd*," followed by words describing its locality and occupation, the gift will not be rendered invalid by an error in such description. So here the description of locality, "situate in the parish of *Kinnerley*," which as to the closes in *Llandisilio* is incorrect, and of occupation, "now in the occupation of *John Edwards*," which, as regards *Paper Mill Meadow*, is incorrect, will not invalidate the gift.

In an early case of *Roe* v. *Vernon* (1) it was held that where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it will not frustrate the grant, though where the grant is in general terms the addition of a particular circumstance will operate by way of restriction and modification of such grant.

The case of *Goodtitle* v. *Southern* (2) cited by the Plaintiffs' counsel was approved by Lord *Cranworth* in the House of Lords, in *Slingsby* v. *Grainger* (3).

In *Webb* v. *Byng* (4), where a testatrix devised "all my *Quendon Hall* estates in *Essex*," and had a mansion called *Quendon Hall*, and land around it, and also detached farms in *Essex*, but there was no property known as the "*Quendon Hall* estates," Vice-Chancellor *Wood* held that extrinsic evidence was admissible to shew what estates the testatrix intended to be included in that description.

The case of *Webber* v. *Stanley* (5), which also came before Vice-Chancellor *Wood* in *Stanley* v. *Stanley* (6), will probably be relied

(1) 5 East, 51.
(2) 1 M. & S. 299.
(3) 7 H. L. C. 273, 282.
(4) 1 K. & J. 580.
(5) 16 C. B. (N.S.) 698.
(6) 2 J. & H. 491.

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on by the other side, but that is distinguishable from the present case as it was not a devise of all the estate of the testatrix called *Tedworth*, followed by an erroneous description as to part of it of the county in which it was situated, but of her lands in the county of *Hants*, which she afterwards described as her "*Tedworth* estates," and it was held to be limited to lands in *Hants*. There the *ratio decidendi* shews the distinction between that case and the present.

Mr. *Phear*, for Defendants in the same interest.

Mr. *E. M. Forster*, for the trustees of the will.

Mr. *Fischer*, Q.C., and Mr. *Cookson*, for the co-heiresses-at-law of the testatrix:—

We contend that there is an intestacy as to the piece of land in question. The whole of the clause relating to the *Dyffrydd* property is to be construed as one devise, not as a particular description with a subsequent misdescription. The property is devised under three terms: first, its name; secondly, its locality; thirdly, its occupation; but the order of description cannot affect the subject of the devise. The intention was to devise, not all the property known by the name of *Dyffrydd*, but only such parts as were locally situated in the parish of *Kinnerley*, and were in the occupation of *John Edwards*.

In a very similar case, *Woodden* v. *Osbourn* (1), a testator being seised of lands called *Hayes-lands*, which extended into two villages, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes-lands*, it was held the lands in *Cokefield* only passed. The same devise was the subject of decision in *Tuttesham* v. *Roberts* (2).

Where all the words of description are true, and correctly describe a thing certain, the Court will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words: *Pedley* v. *Dodds* (3). In that case, which was on all fours with the present, the testator had, in 1802, purchased the *A. Farm* in the county of

(1) Cro. Eliz. 674. (2) Cro. Jac. 22.
(3) Law. Rep. 2 Eq. 819.

H. He afterwards acquired adjoining land in the parishes of *S.* and *B.* in the same county, which was thrown into *A. Farm* and occupied therewith, and the whole called *A. Farm* He subsequently made his will and devised all his estate, consisting of *A.* farm, in the parish of *B.*, in the county of *H.*, to trustees. It was held by Vice-Chancellor *Stuart* that the lands in the parishes of *S.* and *B.* did not pass by the devise.

In *Stone* v. *Greening* (1) the facts were even stronger than they are here. There the testator, who devised his freehold messuages, farm lands, and hereditaments in the county of *B.* in trust for *C.*, had a farm in the county of *B.*, the greater part of which was freehold, and parts leasehold for long terms at peppercorn rents, and they were interspersed with, and undistinguishable from, the freehold part, and had been occupied as one farm at one rent. It was held, nevertheless, that the leasehold parts were not comprised in the trust.

In *Hall* v. *Fisher* (2) a testator had devised "all that freehold farm called *Wick Farm*, containing 200 acres or thereabouts, occupied by *W. E.* as tenant," to uses applicable to freehold lands only. At the date of the will and at the death of the testator *W. E.* held under a lease from the testator 202 acres of land, which were described in the lease as *Wick Farm*, of which twelve were leasehold; it was held that the twelve acres did not pass by the devise. Another question under the same will came before the Court of Exchequer in *Morrell* v. *Fisher* (3), where lands were held not to pass under a devise when falsely described as in the occupation of *B.*, who was tenant of other property of the testator.

The same principles apply to the present case, which comes within the maxim, "*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.*" In *Bacon's* comments on that maxim in his Law Tracts (4), he observes: "If the parish of *Hurst* do extend into the counties of *Wiltsh.* and *Barksh.*, and I grant my close called *Callis*, situate and lying in the parish of *Hurst*, in the county of *Wiltsh.*, and the truth is that the whole close lieth in the county of *Barksh.*, yet the law is that it passeth well enough, because there is a certainty suffi-

(1) 13 Sim. 390.
(2) 1 Coll. 47.
(3) 4 Ex. 591.
(4) Page 76 (Rule 13).

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cient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words, 'in the county of *Wiltsh.*,' shall be taken to go to the parish only, and so be true in some sort and not to the close, and so to be false. For if I had granted *omnes terras meas in parochiâ de Hurst, in com. Wiltsh.*, and I have no lands in *Wiltsh.*, but in *Barksh.*, nothing had passed. But in the principal case, if the close called *Callis* had extended, part into *Wiltsh.* and part into *Barksh.*, then only that part had passed which lay in *Wiltsh.*" The last observation directly supports our contention, and is cited by Vice-Chancellor *Stuart* in support of his decision in *Pedley* v. *Dodds* (1).

In *Doe* v. *Bower* (2) a testator devised "all my messuages at, in, or near a street called *Snig Hill*, in *Sheffield*, which I lately purchased." The testator had four houses about 20 yards from *Snig Hill*, and two houses 400 yards from it, all of which he had purchased. It was held that, as there were four houses which fulfilled the conditions of the devise, the two others did not pass.

In *Webber* v. *Stanley* (3) the testatrix, to whom her husband had devised "all his lands at or near *Tedworth*," made the following devises: "My mansion-house at *Tedworth* in the county of *Hants*, and all my lands in the county of *Hants* devised to me by the will of my husband;" and she afterwards described the lands so devised as her *Tedworth* estate. It appeared that the mansion-house of *Tedworth* was in the county of *Hants*, and that a portion of the *Tedworth* estate was in that county, but that the larger part of the estate was in the county of *Wilts*; and it was held that the devise must be limited to those lands which were locally situated in the county of *Hants*.

We submit that that case cannot, as the other side have contended, be distinguished from the present, and that as to the three closes in question there is an intestacy.

LORD SELBORNE, L.C.:—

This case has been very ably argued on all sides, and it is far from being free from difficulty; but I do not think if I heard more

(1) Law Rep. 2 Eq. 819, 824.
(2) 3 B. & Ad. 453.
(3) 16 C. B. (N.S.) 698.

about it I should alter the opinion I have already formed, and therefore I proceed to give judgment.

These are cases of great nicety, and I should not at all dispute the principle laid down in *Webber* v. *Stanley* (1), nor the maxim which Mr. *Cookson* has cited. It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to exclude anything which any part of those terms does not accurately fit. On the other hand, I apprehend that if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded.

The first observation which I shall make on this clause of the will is, that there is a distinction not unworthy of attention between the manner in which it is expressed, and the manner in which all the other devises of real estate which are found in the will are expressed. In every case the testatrix has used words to describe the situation of the particular property with which she deals, and also the occupation of it. In several cases it is quite clear that the conjoint effect of the words of description, situation, and occupation, is the only means you have of indentifying the property. Perhaps it may be said to be so in every instance, except in this particular case. In two instances she has used the word "situated" with reference to property which she described, not as situated in a parish merely, but at a particular place in a parish. For instance, she begins by giving "all my farm and lands situate at *Hodghurst*, in the parish of *Church Stretton*, now in my own occupation;" then immediately afterwards, "all that my cottage and garden at the *Lower Wood*."

Now if she had intended the words "the *Dyffrydd* and the *Little Dyffrydd*" as mere words of situation in the gift with which we are dealing, I think she would have followed the form of expression found in those other places, and have said, "all that my share and interest in certain messuages, lands, and premises,

(1) 16 C. B. (N.S.) 698.

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situate at *Dyffrydd* and *Little Dyffrydd*, in the parish of *Kinnerley*, in the county of *Salop*, now in the occupation of *John Edwards*." But she has not done that. She has referred to those subjects by a known name. It is clear that she wished to give all her share and interest in them. Those words shew that what she intended was all she could pass. But what are the leading words of description there? I apprehend they are these: "The messuages, lands, and premises called or known by the name of the *Dyffrydd* and the *Little Dyffrydd*," and having by those leading words described the subject matter of the gift, she goes on to speak of the accidents of its situation and the state of occupation, as she has done in other places. The evidence clearly proves that there was a subject known by those two names, and it is not unimportant that there were two subjects known by the two names. The definite article occurs three times. It is "the" lands called or known by the name of *the Dyffrydd* and *the Little Dyffrydd*. I take it to be clear that if there was any aggregate subject consisting of messuages, lands, and premises which was known by the name of "the *Dyffrydd*," she meant that subject; and that if there was any aggregate subject known by the name of "the *Little Dyffrydd*," she meant that, and not, *primâ facie*, a part of it.

Then it appears that there was such a subject—a compact estate, occupied with the single exception of that part of it which is called "the *Paper Mill Meadow*," by *John Morris*, but not at all strictly and literally in the parish of *Kinnerley*. There were two small pieces on the same side of the river, surrounded on all sides except the river side, by land, in the parish of *Kinnerley*, occupied with that land, and described as accessible only from that land. It is impossible, on the evidence, to say that the lands which would remain, after deducting these two parcels which were in the parish of *Llandisilio* and *Paper Mill Meadow*, were called or known by the name of "the *Dyffrydd* and the *Little Dyffrydd*." As a matter of fact they were not, for no such name had been used for the pieces that would remain after that deduction. They would be only part; and the language of Lord *Mansfield* in the case that was cited of *Paul* v. *Paul* (1), "that if he had intended to give part he would have said so," and other passages of

(1) 1 W. Bl. 255.

the same judgment seem to me to be equally applicable to this case.

I think also that the cases of *Goodtitle* v. *Southern* (1), and *Down* v. *Down* (2), and the observations approving of those cases made by Lord *Cranworth* in the House of Lords in the case of *Slingsby* v. *Grainger* (3), go to support the same conclusion.

Therefore, although this case is one of more than ordinary difficulty, especially as you have in the subordinate part two inexact descriptions conjoined instead of only one, I think I am bound to hold that the principal subject described by the leading words is, all her interest in that estate which was called by the name of the *Dyffrydd* and the *Little Dyffrydd*, and that the error of description lies in the accessory words, namely, the words descriptive of situation, and the words descriptive of occupation, and that the whole passed. Of the authorities cited on the other side, the one which is most nearly in point, and which I do not profess myself able to distinguish satisfactorily from this case, is the *dictum* of Lord *Bacon* in the case of the close called *Callis*, which is referred to in his Law Tracts (4) in the comments on the 13th Maxim.

It seems to me that it is unnecessary to reconcile that *dictum* with *Paul* v. *Paul* (5) and *Goodtitle* v. *Southern*. I cannot but think the case here is the same as if the word "all" had preceded the words "the messuages, lands, and premises." Although Lord *Bacon* was a great man, and not to be spoken of as a lawyer without great respect, yet this is not a judicial decision, and if it is not reconcilable with later judicial decisions, it is not to be cited as an authority. The case of *Pedley* v. *Dodds* (6) is a case decidedly different. There that which was held to pass by the devise was more properly described as that farm than anything else would have been, in the opinion of the learned Judge; and the *dictum* of the learned Judge as to the view he might have taken in accordance with Lord *Bacon's dictum* was for the purpose of a decision on those particular facts. *Stone* v. *Greening* (7) and *Hall* v. *Fisher* (8) were cases about which some doubt might have been entertained, but having been decided by two eminent Judges,

(1) 1 M. & S. 299.
(2) 7 Taunt. 343.
(3) 7 H. L. C. 282.
(4) Page 76.
(5) 1 W. Bl. 255.
(6) Law Rep. 2 Eq. 819.
(7) 13 Sim. 390.
(8) 1 Coll. 47.

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I will assume them to be correct. These decisions turn on this, that the word "freehold" occurred in the description. In *Stone* v. *Greening* (1) the testator gave "his freehold lands in the county of *Buckingham*," and it was held that he did not intend to give anything that was not freehold. So in *Hall* v. *Fisher* (2). I assume that to be correct; but assuming that to be correct, I do not think it applies here. Therefore my decision is that the whole passed by this devise.

Solicitors: Messrs. *Miller & Gane;* Mr. *W. H. Bosanquet;* Messrs. *Pownall, Son, Cross, & Knott,* agents for Mr. *W. Lucas, Wem, Salop.*

(1) 13 Sim. 390. (2) 1 Coll. 47.

REPUBLIC OF LIBERIA *v.* IMPERIAL BANK.

V.-C. M.
1873
May 31.

[1871 L. 168.]

Affidavit of Documents—Bill by a Republic—Proper Officer of the Government.

Where a bill was filed by a republican government it was held that a Defendant having put in a sufficient answer was entitled to the usual affidavit of documents to be made by one or more of the ministers or officers of the Plaintiff government.

THIS was an application upon adjourned summons on behalf of one of the Defendants, Mr. *Roye*, that the Plaintiffs might be ordered to make the usual affidavit of documents, the Defendant having put in a sufficient answer. All or most of the documents required to be produced belonged to the late President of the Republic of *Liberia*, and on his death were seized by the officials of the Republic.

Mr. *Higgins*, Q.C., and Mr. *Langley*, in support of the application:—

The Defendant having put in a sufficient answer it is his absolute right to have the usual affidavit of documents, and he is not to be prejudiced by the fact of the Plaintiffs being a sovereign government. There is no difficulty in such an affidavit being made by the proper officer of the government, and a similar order to that made in *Ranger* v. *Great Western Railway Company* (1) might be made in this case. There it was ordered that one or more of the officers of the company should make the necessary affidavit. There must be some officer of the Republic who has the custody of the documents, and whoever it may be should be ordered to produce them. The fact of the documents being in a foreign country does not alter the Defendant's right, because in *Freeman* v. *Fairlie* (2) an executor was compelled to produce documents which he had left behind him in *India*. The case of *United States of America* v. *Wagner* (3) shews that the Court will not allow the proceedings in a suit to continue until the means of discovery are secured to the Defendant.

(1) 4 De G. & J. 74. (2) 3 Mer. 45.
(3) Law Rep. 2 Ch. 582.

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Mr. *Glasse*, Q.C., and Mr. *Rogers*, for the Plaintiffs:—

The Plaintiffs have already offered to produce certain documents which relate to the subject of the suit, but they object to produce all the documents in possession of the Republic, which are very numerous, and may not when produced have any reference to the matter. In consequence of the papers of the last President having been seized, it is almost impossible to find them, and the Plaintiffs cannot put forward any person whose duty it is to have the custody of them. If the Defendant would specify the class of documents required they should be produced. But as the bill is filed by a government the Court cannot order the government to make the ordinary affidavit of documents. In the case of *Imperial Mercantile Credit Association* v. *Witham* (1) it was held that where a company or corporation were Plaintiffs in a suit the Defendant could not, under sect. 19 of 15 & 16 Vict. c. 86, file interrogatories for the examination of its officers when they were not parties to the suit.

Mr. *Higgins*, in reply:—

We cannot rest satisfied with such documents as the Plaintiffs think fit to offer us, and we cannot tell what documents they may have in their possession. We want the usual affidavit of documents, and that we have a right to require.

SIR R. MALINS, V.C.:—

If the Plaintiff here were an individual, and the affidavit were asked for, it would be a pure matter of course. The difficulty is, that the Plaintiffs are a foreign government. Of course the Republic can make no affidavit; but so it is in the case of a railway company. If a Defendant puts in a full and sufficient answer to the bill of a railway company, the railway company cannot make an oath; but the form is settled in the case of *Ranger* v. *Great Western Railway Company* (2). It is true that was a case where the affidavit had to be made by the Defendants, and the order was that the Defendants, the *Great Western Company*, do on or before a certain day file one or more full and sufficient

(1) Law Rep. 3 Eq. 89.

(2) 4 De G. & J. 74.

affidavit or affidavits to be made by one or more of their officers, and then following the common form. How, then, is this to be done in the case of a foreign government? It seems to me that what fell from the Lord Justice *Turner* and Lord Justice *Cairns*, in the case of *United States of America* v. *Wagner* (1), is conclusive. Lord Justice *Turner* says (2): "There is this other and far better right also, that it would be in the power of the Court to stay the proceedings in this suit unless and until such discovery should be given as the justice of the case may require. It was ingeniously attempted in the course of the argument on the part of the Respondents to turn in their favour the cases which have been decided in this Court in suits by and against sovereigns." Lord Justice *Cairns*, taking the same view, says: "I apprehend that the only rule is, that the person, state, or corporation which has the interest must be the Plaintiff, and the Court will do the best the law admits of to secure to the Defendant such defensive discovery and relief as he may be entitled to. The Court can in all cases suspend relief on the original bill until justice is in this respect done to the Defendant." Therefore it seems to me that, although the summons is that the Plaintiffs do make the affidavit, considering that the Republic are the Plaintiffs, the proper order would be that the Plaintiffs do, on or before a day to be named, file one or more full and sufficient affidavit or affidavits to be made by one or more of the ministers or officers of the government, stating whether they, the Plaintiffs, have or have had in their possession or power any, and if any, what documents relating to the matters in question in this suit, following the terms of the order in *Ranger* v. *Great Western Railway Company* (3).

Upon this I imagine they will make an affidavit such as they think fit. If the affidavit is not sufficient, and it is objected to, and the matter comes before the Court, then will be the proper time to take further steps.

Solicitors for the Plaintiffs: Messrs. *Tilleard, Godden, & Holme.*
Solicitors for the Defendant: Messrs. *Flux & Co.*

(1) Law Rep. 2 Ch. 582. (2) Law Rep. 2 Ch. 592.
(3) 4 De G. & J. 74.

V.-C. M.
1873
April 22;
June 2.

BOOTH *v.* TURLE.

County Court Appeal—Statute of Frauds—Evidence—28 & 29 *Vict. c.* 99, *s.* 18.

A plaint in the County Court stated that the Plaintiff had assigned to the Defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises were to be held by the Defendant in trust for the Plaintiff. Evidence was given on both sides, but the Judge, being of opinion that actual fraud had not been proved against the Defendant, and there being no resulting trust in the assignment, decided that the *Statute of Frauds* was applicable, and dismissed the plaint, without coming to any distinct decision upon the evidence:—

Held, upon appeal, that the Judge ought to have decided that the *Statute of Frauds* had no application; and the Court, upon a consideration of the evidence, decided that the Plaintiff was entitled to relief, and reversed the decree.

THIS was an appeal from the County Court of *Kent* holden at *Bromley*.

The plaint stated that in the early part of 1871 the Plaintiff, *William Booth*, carried on business as a wine and spirit dealer in certain premises situate in *Beckenham*, *Kent*, which he held under an agreement for a lease still subsisting from Mr. *Lea Wilson*, such premises consisting of a shop facing the street, with a piece of ground at the back. The Plaintiff had erected on the ground at the back certain stables communicating with other land in his occupation, not comprised in the agreement for a lease, and paid for building such stables, out of his own pocket, about £160. The Plaintiff also carried on business as a grocer in another house in *Beckenham*, and used the stables for the purposes of both businesses.

Towards the latter end of 1871, the Plaintiff, being desirous of retiring from and disposing of the wine and spirit business, instructed Messrs. *Bath & Co.*, house agents, to take steps for disposing thereof at the price of £300, and the Defendant, *Richard Turle*, being introduced by Messrs. *Bath*, entered into negotiations with the Plaintiff for the purchase of the said business and premises. In the course of such negotiations the Defendant said he did not want the stables, and the Plaintiff, being obliged to keep horses and carts for the purpose of his grocery business,

agreed to retain the stables and allow an abatement of £150 upon the purchase-money.

It was accordingly agreed between the Plaintiff and Defendant that the Defendant should purchase the wine and spirit business, and the Plaintiff's interest in the premises (other than the stables), for the sum of £150, but it was thought more convenient that the entire premises comprised in the agreement for a lease should be assigned to the Defendant, and that he should be a trustee of the stables for the Plaintiff, and permit the Plaintiff to have the use and occupation thereof during the remainder of the term.

Accordingly, by an indenture dated the 3rd of February, 1872, between Mr. *Lea Wilson*, who was made a party for the purpose of consenting to the transfer, and the Plaintiff and Defendant, in consideration of £150 paid to the Plaintiff by the Defendant, the Plaintiff assigned the premises comprised in the agreement for a lease to the Defendant for the residue of the term. The indenture was prepared by the Defendant's solicitor, and the Plaintiff had no professional advice in respect thereof; and neither the indenture nor the written agreement which preceded it contained any statement of the arrangement that the Defendant was to hold the stables in trust for the Plaintiff. The Plaintiff, however, alleged that the agreement and indenture were entered into on the express understanding that the Defendant was to hold the stables as trustee for the Plaintiff, and the Plaintiff was to have the use and occupation thereof during the term, and that the purchase-money was in fact reduced from £300 to £150 upon that understanding and agreement.

The Defendant, upon the execution of the indenture of assignment, entered into possession of the premises other than the stables, and the Plaintiff continued in the free occupation of the stables until the month of October, 1872.

The plaint further stated that shortly after the execution of the indenture the assessor of taxes called at the shop when both the Plaintiff and Defendant were present, and proposed to alter the entry in the rate book with respect to all the premises, from the name of the Plaintiff to that of the Defendant. The Defendant thereupon objected to be rated for the stables as he had no beneficial interest therein, and accordingly the Plaintiff was rated for

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the stables at £8 a year, and the Defendant was rated for the premises other than the stables at £40 a year.

The Plaintiff had ever since remained in the free occupation of the stables, and had paid the rates in respect thereof, but he had never been asked to pay any rent to the Defendant.

The Defendant, however, in the month of October, 1872, finding that he had obtained the legal estate in the entire premises comprised in the lease, laid claim to the stables, and on the 16th of October, 1872, he commenced an action of ejectment for the recovery thereof.

The Plaintiff submitted that it was a fraud on the part of the Defendant to attempt to avail himself of his legal right against the Plaintiff, and that he ought to be restrained from so doing.

The plaint, therefore, prayed that the Defendant might be declared to be a trustee of the said stables for the Plaintiff, and might be restrained from further prosecuting the action of ejectment against the Plaintiff, or bringing any other action or proceedings for the recovery of the stables.

The Defendant put in a demurrer to the plaint for want of equity, he also pleaded the *Statute of Frauds*, and, subject to the demurrer and plea, the Defendant put in an answer traversing the whole of the allegations contained in the plaint.

The suit was heard on the 20th of December, 1872, before the County Court Judge, and evidence was taken *vivâ voce*, which was to the following effect:—

The Plaintiff supported the statement contained in his plaint, and further said that it was agreed between him and the Defendant that if the Defendant should at any time require the stables he was to have them upon paying £150 more, or a rental of £15 a year. This evidence was confirmed by Mr. *Robert Bath* and Mr. *John Bath*, the house agents, who stated that the proposal regarding the stables being excluded from the purchase, originated with them in consequence of the Defendant saying he was unable to pay so large a sum as £300 for the whole premises. The tax collector gave evidence as to the conversation relative to the premises being rated to the Plaintiff, and the refusal of the Defendant to pay rates for the stables, as he had nothing to do with them. Mr. *Lea Wilson*, the landlord, gave evidence as to what he

understood to be the terms agreed upon between the Plaintiff and Defendant, which were, that the Defendant was to take the shop only and not the stables, and he stated that the Plaintiff had paid rent for the stables since the assignment, and the Defendant had only paid rent for the remainder of the premises.

The evidence given by the Defendant himself was to the effect that he believed he was purchasing the stables as well as the shop and the business, but that he told the Plaintiff he might have the use of the stables until he wanted them. He had never agreed to hold the stables in trust for the Plaintiff, and nothing was said about trust. That the stables were rated to the Plaintiff because he was in temporary occupation of them, but he did not understand that the Plaintiff was to have anything to do with the stables except as a friendly arrangement.

By the decretal order, made at the hearing of the plaint, the Judge, being of opinion that actual fraud had not been proved against the Defendant, and there being no resulting trust, the *Statute of Frauds*, which required that declarations of trust should be in writing, was applicable; he therefore dismissed the plaint with costs to be paid by the Plaintiff.

The question for the opinion of the Vice-Chancellor upon the appeal was, whether upon the pleadings and the evidence adduced at the hearing of the plaint which, in the opinion of the Judge, did not amount to actual fraud against the Defendant, a decree ought not to have been made in favour of the Plaintiff, and consequently whether or not the decree should be reversed with costs as the Court should think fit.

Mr. *Glasse*, Q.C., and Mr. *Rogers*, for the Plaintiff:—

The County Court Judge has entirely miscarried in deciding this case. The evidence in favour of the Plaintiff is convincing; all the witnesses are found to unite in supporting the allegations in the plaint, to the effect that the Plaintiff asked £300 for the whole of the premises, and that he took off £150 as the value of the stables which he was to keep for his own occupation. This is the evident justice of the case, for the Plaintiff had paid more than that sum for the erection of the stables, and it was natural that he should deduct that amount in case the Defendant was willing to take the

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other portion of the premises without the stables. But the Judge seems to have acted on the belief that there must be fraud proved in obtaining the assignment, and he considered himself bound to find such proof of fraud against the Defendant as would render him liable to a criminal prosecution. He did not examine the evidence with a view to ascertain the justice of the case, but, being of opinion that actual fraud had not been proved against the Defendant, and there being no resulting trust apparent on the deed, he considered that the *Statute of Frauds* was applicable, and therefore dismissed the plaint. That this is an entire misconception of the law is evident from the cases of *Lincoln* v. *Wright* (1), *Davies* v. *Otty* (2), and *Pike* v. *Nicholas* (3), where it is laid down that the *Statute of Frauds* was not intended to be used for the purpose of covering fraud.

Mr. *Pearson*, Q.C., and Mr. *Willis*, for the Defendant:—

It is not shewn by the evidence that there was a valid agreement distinct from the assignment of the lease, that the stables were not to be held beneficially by the Defendant. There is no allusion to any trust in the deed of assignment, and it is admitted that there is no recognition of the trust in any written document. The Plaintiff puts his own view of the case, and the Defendant denies the statement. Then the house agent, whose duty it was to shew distinctly the nature of the agreement, covers his own neglect by siding with the Plaintiff. If there ever was such an understanding as that the Defendant should hold the premises in trust for the Plaintiff it ought to have been distinctly stated in writing.

The evidence of the rate collector carries the case no further than what the Defendant admits, namely, that he considered the Plaintiff ought to pay rates for the stables as long as he continued in the occupation of them. This was perfectly just and reasonable, but it does not contradict the Defendant's version of the transaction, which is, that he gave the Plaintiff permission to use the stables until he should require them himself. The assignment was drawn upon instructions given by the house agent on behalf of the Defendant, and if any notice of this alleged agreement for a

(1) 4 De G. & J. 16. (2) 35 Beav. 208.
(3) Law Rep. 5 Ch. 251.

resulting trust had been given, it is impossible that the deed should have been prepared without a statement regarding it being introduced.

SIR R. MALINS, V.C.:—

There is this difficulty in the case: that the Judge of the County Court has decided the plaint on the ground of the *Statute of Frauds*, in which I think he has miscarried, and he has not come to any conclusion upon the facts as to what was the intention of the parties in executing this assignment. If the Judge had come to a distinct decision upon the evidence I should have no inclination to disturb his finding, but he has not done so. I think, therefore, the best course would be to refer the matter back to the County Court to have the evidence taken before a jury, who would find a verdict upon the facts.

The parties having expressed a wish that the Vice-Chancellor should himself decide upon the evidence now before the Court, His Honour reserved his judgment.

June 22. SIR R. MALINS, V.C., after stating the facts of the plaint, continued:—

The Defendant's statement in answer to this plaint is in the form of a demurrer, plea, and answer, but may be regarded as simply an answer. He relies upon the assignment of the 3rd of February, 1872, of the whole of the property comprised in the agreement for a lease from Mr. *Lea Wilson*, and denies all the allegations contained in the plaint.

If the contract between the parties really was as alleged and sworn by the Plaintiff, for the sale of the rest of the property without the stables, it is clear that the conduct of the Defendant in attempting to avail himself of the legal assignment of the whole is fraudulent, and that he cannot protect himself by the *Statute of Frauds* in the commission of such a fraud. That statute was passed, as has been often said, to prevent, and not to protect or cover fraud.

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The doctrines of this Court on that subject are perfectly clear.

In *Lincoln* v. *Wright* (1) it was held by the Lords Justices that *Wright's* insisting upon the conveyance as absolute when it had been agreed that it should be a mortgage was a fraud, and the *Statute of Frauds* was not allowed by Courts of Equity to cover a fraud; and in *Davies* v. *Otty* (2), where there was a conveyance of property on a parol agreement that the Defendant should reconvey if the Plaintiff was not convicted of bigamy, and the Defendant denied the agreement, and insisted on the *Statute of Frauds*, the trust not being in writing, it was held that this was a case of fraud on the part of the Defendant, and the statute did not apply.

What, then, was the real contract between the parties? Did or did not the Plaintiff offer to sell and the Defendant to buy the stables as well as the rest of the property. That question can only be determined by a careful consideration of the evidence and all the circumstances of the case.

There is in the first place a very material fact not in dispute, namely, that the Plaintiff has ever since the completion of the contract remained and still is in possession of the stables without the payment of rent or other consideration for such occupation.

The Defendant says that the Plaintiff has remained there merely by his permission as tenant at will or by sufferance; but, considering the keenness of the Defendant's bargain as to the price to be given for the property, I can hardly think it possible that if he had known himself to be the owner of the stables he would not have required some equivalent for the use of them, particularly as it is admitted to have been known to both parties that the possession of them was important to the Plaintiff, and that the value was certainly not less than from £10 to £15 a year.

[His Honour then referred at length to the evidence in the case, observing that against the several witnesses of the Plaintiff there was nothing but the denial of the Defendant himself, and continued:—]

Upon this evidence I feel compelled to come to the conclusion that the Plaintiff is right and the Defendant is wrong in his contention.

On this result I am of opinion that the learned County Court Judge ought to have decided that the *Statute of Frauds* had no

(1) 4 De G. & J. 16. (2) 35 Beav. 208.

application to the case, and ought to have given to the Plaintiff the relief he sought. V.-C. M. 1873 BOOTH v. TUBLE.

The decree must therefore be reversed, and the Plaintiff must have the relief asked upon the plaint, and the Defendant must pay the costs below and also the costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Gregory & Bowerman.*
Solicitors for the Defendant: Messrs. *Chorley & Crawford.*

MONTAGUE *v.* FLOCKTON.

V.-C. M. 1873 *May* 26.

[1873 M. 103.]

Injunction—Theatrical Engagement—Contract to play for "the Season"—No Negative Clause against performing elsewhere.

An actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.

Observations on *Lumley* v. *Wagner* (1).

THIS was a motion on behalf of the Plaintiff, *Henry James Montague,* the lessee and manager of the *Globe Theatre* in *London,* for an injunction to restrain the Defendant, *Charles Poston Flockton,* from acting, or causing his name to be advertised as about to act, at any place other than the Plaintiff's theatre, or otherwise than for the Plaintiff's benefit, for a period of nine months, from the 2nd of October 1872, and in particular from acting at an intended dramatic performance at the *Crystal Palace.*

In August, 1871, an engagement was proposed to the Defendant on behalf of the Plaintiff, that the Defendant should perform, upon certain terms specified, at the *Globe Theatre.* To this proposal the following answer was returned by the Defendant, dated the 16th of August, 1871, and addressed to Mr. *Edward English,* the Plaintiff's agent:—

"Dear Sir,—I accept the engagement for the *Globe Theatre,*

(1) 1 D. M. & G. 604.

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under the management of *H. J. Montague*, Esq., at a weekly salary of five pounds, and, if required, to go into the provinces, travelling expenses paid and 20 per cent. on my *London* salary. Line of business, old men and character business; to commence on or about 2nd October, 1871. For the season of not less than nine months' duration. A fortnight's rehearsal to be given prior to opening, subject to the rules and regulations of the theatre.

"(Signed) *C. P. Flockton.*"

During the pendency of the last-mentioned agreement, namely, on the 2nd of March, 1872, the Plaintiff and the Defendant entered into another agreement, which was accepted by the Defendant in these terms:—

"I hereby accept the renewal of my engagement with *H. J. Montague*, Esq., for his next season on the same terms as at present existing between us.

"(Signed) *C. P. Flockton.*"

It appeared that in May, 1872, a notice was posted in the green-room of the *Globe Theatre* to the effect that the season would close on the 4th of June, on which day all pending engagements would terminate; and the house was accordingly closed upon that day.

A company was then formed by the Plaintiff for certain theatrical performances in the provinces, in which the Defendant took part, and these performances commenced on the 4th of June, and terminated on the 28th of September, 1872.

The next *London* season at the *Globe Theatre* commenced in October, 1872, and the Defendant, Mr. *Flockton*, played at the theatre as he had previously done till the 10th of March, 1873, when he requested the Plaintiff to allow him to perform at the *Regent's Park Theatre*, which was to be opened in May. Upon this occasion, according to the Plaintiff's statement, the Defendant said, "I only ask you to lend me, and I shall finish my engagement with you afterwards." The Plaintiff declined to accede to the Defendant's request, on the ground that he should require his services for the next piece that was to be brought out. On the 2nd of April the Defendant wrote the following letter to the Plaintiff:—

"Dear Sir,—As you are aware my engagement with you terminated on the 2nd of December last, pursuant to our agreement

bearing date the 2nd of March, 1872, I am desirous to close my connection with your theatre, and therefore now give you four weeks' notice in pursuance of such my desire."

The matter was then placed by the Plaintiff in the hands of his solicitors, Messrs. *Lumley*, who wrote to the Defendant stating that he had taken a wrong view of the terms of the contract, which did not in fact terminate until nine months after the commencement of the season, in October, 1872; that the Defendant was causing Mr. *Montague* considerable inconvenience and loss, by not attending the rehearsal of a new play soon to be produced, although every reasonable notice had been given him; and they called upon him to be in attendance the following morning at eleven o'clock to rehearse the part assigned him.

This summons not being attended to by the Defendant, the Plaintiff was obliged to engage another actor, Mr. *Palmer*, to perform the part assigned to the Defendant.

The Plaintiff then discovered that the Defendant was negotiating for an agreement to act at a new theatre in course of erection in *London*, before the expiration of the term alleged to be comprised in the agreement of the 2nd of March, 1872, and on the 28th of April, 1873, the Plaintiff also discovered that the Defendant was advertised as intending to act on the 3rd of May at the *Crystal Palace* in the part of *Polonius* in *Hamlet*, and consequently this bill was filed for an injunction in the terms already stated.

It was alleged by the Defendant that, according to the prevailing custom, the manager had the right of closing the season by notice, and that he had done so. The Plaintiff alleged that the notice did not close the season. There was conflicting evidence on this point.

Mr. *Glasse*, Q.C., and Mr. *E. Cutler*, for the Plaintiff:—

The terms of the contract existing between Mr. *Montague* and the Defendant are perfectly plain.

The first agreement of the 16th of August, 1871, was for the existing season commencing on the 2nd of October, 1871, for a period of at least nine months. This agreement could not terminate, therefore, at the earliest, before the 2nd of July following

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but previously to that time—that is, on the 3rd of June—a company was formed by Mr. *Montague* for performances in the country, and Mr. *Flockton* was one of the actors in that company. The country performances were expressly provided for by the agreement of the 16th of August, 1871, under the terms: "If required to go into the provinces, travelling expenses to be paid, and 20 per cent. on the *London* salary." The first season consequently terminated at the end of the country engagement, which took place on the 28th of September. Then came the second agreement, dated the 2nd of March, 1872, whereby Mr. *Flockton* accepted a renewal of his engagement for the next season on the same terms as then existed between him and Mr. *Montague*. The plain meaning of this agreement was for another season of at least nine months, commencing, as usual, in the first week of October, 1872. This second agreement could not terminate earlier than the beginning of July, 1873, and might continue longer in case the season should not then have terminated. The Defendant, under these circumstances, is bound to continue to give his services to the Plaintiff, and is not justified in the course he has taken.

We submit also that the Defendant is not only bound to fulfil his agreement by acting for the Plaintiff, but he is precluded from acting at any other theatre during the period for which he has agreed to act for the Plaintiff. It is true that the Court cannot oblige an actor to perform, but it can prohibit him by injunction from performing elsewhere. This was decided in *Lumley* v. *Wagner* (1), where Mdlle. *Wagner* was restrained by injunction from singing at any other theatre than the Plaintiff's. In *Fechter* v. *Montgomery* (2), although the Court, under the peculiar circumstances of that case, refused an injunction, still it was held that, under an engagement to perform for a certain period at one theatre, a contract would be inferred that the Defendant should not perform elsewhere. So in *Webster* v. *Dillon* (3) an injunction was granted to restrain the Defendant from acting during the twelve nights he was engaged to the Plaintiff at any other theatre than the Plaintiff's; and in *De Mattos* v. *Gibson* (4) the same principle was acted upon, where the Court restrained the

(1) 1 D. M. & G. 604.
(2) 33 Beav. 22.
(3) 3 Jur. (N.S.) 432.
(4) 4 De G. & J. 276.

Defendant from employing a ship for any other purpose than that for which she was engaged under the charterparty.

Mr. *Hemming*, for the Defendant:—

The allegation that the Defendant has broken his engagement is devoid of all foundation; there is no contract now subsisting between him and the Plaintiff. The first agreement entered into on the 16th of August, 1871, was for the ensuing season, and the season was terminated by the Plaintiff himself when he posted up a notice in his theatre that the theatre would be closed on the 4th of June, on which day all engagements would terminate. This fact is not denied by the Plaintiff, and the theatre was actually closed on that day. Then the second agreement, which was signed by the Defendant on the 2nd of March, was for another season, and that was completed at the termination of the performances in the provinces. That season commenced on the 3rd of June, and continued till the 28th of September. This was the conclusion of the second agreement, and from that time Mr. *Flockton* has continued his engagement as if he were a tenant at will, and that engagement was subject to be terminated by either party, according to the custom of the profession, by giving one month's notice at any period. This notice he gave on the 2nd of April, and the engagement is consequently at an end. Under any circumstances, the agreement signed on the 2nd of March could not continue beyond the 2nd of December, 1872, which completed the nine months. The Plaintiff, however, wishes now to tack on the provincial season to the *London* season, and thus make the two seasons into one. The performances which commenced in October, 1872, constituted a third season, and the Defendant from that period has continued to perform on the terms of the old agreement as a tenant at will.

The question is one arising upon the doubtful terms of a very doubtful agreement, and it is not the custom of the Court to grant an injunction when that is the case. The Court cannot, upon motion for an injunction, enforce the terms of such a contract as this, since it contains no negative clause. In *Lumley* v. *Wagner* (1) there was a negative clause providing that Mdlle. *Wagner* should not sing elsewhere than at the *Covent Garden Opera*, and although

(1) 1 D. M. & G. 604.

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the Court could not make an order compelling her to sing for Mr. *Lumley*, it could grant an injunction to restrain her under the negative clause from singing at any other theatre. The case turned upon the negative clause. The necessity of having a negative clause is shewn by the fact that such a clause is invariably introduced into all engagements with operatic singers. In *Fechter* v. *Montgomery* (1) the injunction was refused, and that case certainly can be no authority for granting this injunction; and in *Webster* v. *Dillon* (2) the terms of the injunction were to restrain the Defendant from acting elsewhere during the particular hours at which he was required to perform at the Plaintiff's theatre. That case proves that the Court would not have restrained the Defendant from acting at any other place during the daytime.

The *Crystal Palace* performances are held in the day, and could not interfere with the *Globe Theatre*, which is only open for public performances at night. It cannot do the Plaintiff any harm whatever that the Defendant should take part in the plays at the *Crystal Palace*. No injury can happen to the Plaintiff, and therefore there is no necessity for the Court to interfere by injunction to restrain the Defendant from acting at the *Crystal Palace* or elsewhere when he is not wanted by the Plaintiff.

SIR R. MALINS, V.C., after reading the letter of the Defendant, dated the 16th of August, 1871, accepting the engagement to perform for the Plaintiff during the season of at least nine months, continued:—

The first question is, what is the meaning of that contract? It has been argued that it was an engagement for the season, and that it left the performer at the mercy of the proprietor to terminate the season whenever he thought fit. It is said that Mr. *Montague* having put up a notice in the green-room of the theatre in the month of May, 1872, notifying that the season's engagements would terminate on the 4th of June then next, that that has put an end to the contract. My opinion is, that if an actor engages himself for the season he leaves himself at the mercy (within reasonable limits of construction) of the proprietor of the theatre to fix what the season is. But that is not the meaning of this

(1) 33 Beav. 22. (2) 3 Jur. (N.S.) 432.

contract; because, while the proprietor, Mr. *Montague*, engages Mr. *Flockton* for the season, there is a stipulation which is for the protection of the performer, that that season is not to be one month, two months, or three months, as the proprietor may think proper, but that whenever he may choose to terminate his season, that season, for the purpose of paying the actor, is not to be less than nine months. In my opinion it was absolutely impossible, provided Mr. *Flockton* performed his part of the contract, for Mr. *Montague* to evade performing his part of it by paying the stipulated salary for a period of not less than nine months.

This contract, then, being, as I am bound to assume, understood, in the only way it could be understood, by each of the parties, was commenced in or about the month of October, and matters went on satisfactorily on both sides, as I must assume, because in the month of March, five months after the contract had been commenced, and while Mr. *Flockton* was still performing for Mr. *Montague*, a proposal was made by Mr. *Montague*, and was accepted by Mr. *Flockton*, in these terms: "I hereby accept the renewal of my engagement with *H. J. Montague*, Esq., for his next season on the same terms as at present existing between us." Now, what is the meaning of "the next season?" I am perfectly clear that it was a repetition of the old contract; it was to be the next season commencing in October, 1872, lasting for not less than nine months. It follows that, for the season beginning in 1872 and ending in 1873, Mr. *Montague*, accepting these terms, is bound to pay Mr. *Flockton* for nine months, and Mr. *Flockton* is equally bound to perform for Mr. *Montague*, if Mr. *Montague* requires him to do so. I am surprised that by any ingenuity Mr. *Flockton* should have pursuaded himself that the meaning of that contract was, as he stated in his letter, that the next season was not the *London* season, but the country season. The thing is, in my opinion, perfectly absurd. It has nothing to do with the country season; because the original contract was this—he is to have £5 a week, if required to go into the provinces, assuming, therefore, that he may be required to go, he will agree to do so, and in that case he is to have his travelling expenses paid, and 20 per cent. additional upon his *London* salary. The original contract

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is for a *London* engagement, with the privilege on Mr. *Montague's* part of requiring him to go into the provinces, where he would be entitled to 20 per cent. additional, and all travelling expenses paid. Therefore, when he says the next season, it is subject to the same stipulation; it is for the *London* theatre, with the right on the part of Mr. *Montague* to require him to go into the provinces upon those terms. The contention of Mr. *Flockton* that the next season commenced in the month of June and ended in the month of September is, in my opinion, simply ridiculous. I totally differ from it, and I am clear that it meant the next season commencing in October and terminating at the earliest at the end of nine months.

Then let us see what was the view of the parties themselves, and how this was acted upon. If it were according to Mr. *Flockton's* view, how did it happen that he commenced acting for Mr. *Montague* again in the month of October last, and continued uninterruptedly and amicably, as I understand, to act for him down to the month of April? The object of it is evidently that which is stated by the Plaintiff in his affidavit filed the 6th of March; and as it is not contradicted by Mr. *Flockton*, I must take it to be perfectly accurate. Mr. *Montague* says: "On or about the 20th day of March, 1873, I was in my dressing-room at the *Globe Theatre* with a friend, and the Defendant came in and asked me if I would allow him to go and play a very fine part at the *Regent's Park Theatre*, which it was proposed to open in the month of May, and, he added" (now here is an admission of the whole case), "'Of course you will lend me for a time only: then I will come back and finish my engagement.' I said, in reply, 'I am sorry, my dear *Flockton*, I cannot, as I hope to have you in my next piece.' On my saying that, he walked away rather annoyed." That was on the 20th of March. Then what is the next thing he does? I am satisfied from the evidence that, there being a piece then in preparation, it was the intention of Mr. *Montague* that Mr. *Flockton* should take a part in it; but, unfortunately, before it came out Mr. *Flockton*, on the 2nd of April, adhering to this most unjustifiable view of the contract, writes to Mr. *Montague* this letter:—"As you are aware my engagement with you terminated on the 2nd of December last, pursuant to our agreement bear-

ing date the 2nd of March, 1872, I am desirous to cease my connection with your theatre, and therefore now give you four weeks' notice in pursuance of such my desire." Now he knew perfectly well that Mr. *Montague* was not aware of any such thing as the termination of the agreement in December, for he knew that the conversation of the 20th of March which occurred between them took an entirely different view of the case, and after making that admission himself to Mr. *Montague*, I cannot conceive that anything could be more unjustifiable than that Mr. *Flockton* should say, "As you are aware, my engagement with you terminated on the 22nd of December last." That was objected to by Mr. *Montague*, who, I think, acted in perfect good faith. He remonstrated, and finding his remonstrances were not attended to, he applied to his solicitors. So far from Mr. *Montague* not performing his part of the contract, or being desirous to avoid employing Mr. *Flockton* in his new piece, as was suggested, Messrs. *Lumley* wrote a letter to this effect:—"Mr. *Montague* states further that you are even now causing him considerable inconvenience and loss by your not attending to the rehearsal of a new play soon to be produced, although every reasonable notice has been given you, and we now call upon you to be in attendance to-morrow on the stage to rehearse the part assigned to you at 11 o'clock, at which hour the company assemble for the purpose of rehearsal." Therefore it is Mr. *Flockton* who is now repudiating his contract. He is called upon to perform it, but he adheres to his refusal, and seeks an engagement, first at the *Regent's Park Theatre*, and secondly at the *Crystal Palace*. Now, unless theatrical managers are to be completely at the mercy of their performers, the performers are not to be suffered to break their engagements whenever they think fit. I can readily believe, if Mr. *Flockton* had requested Mr. *Montague* to allow him to perform the part of *Polonius* in *Hamlet* at the *Crystal Palace*, that his request would have been acceded to, and this suit would not have been instituted; but that was not all that Mr. *Flockton* wanted. In setting his contract at defiance, it is perfectly clear his object was not simply to perform at the *Crystal Palace*, but also to perform at the *Regent's Park Theatre*, either because he could get a better salary or be enabled to play a higher class of characters, which perhaps

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to an actor is as strong an inducement as any money that can be given to him. But he is, in my opinion, entirely wrong.

If he is put upon his contract, he is bound to perform for Mr. *Montague* for the season; and I am glad to hear from his counsel, Mr. *Hemming*, that Mr. *Flockton* expresses his willingness, if the Court puts a different construction upon it to his own, to submit to the opinion of the Court, and perform his part of the contract.

Now that being the effect of the agreement between the parties, that is, that Mr. *Flockton* has bound himself for the whole of the season which commenced in October last for nine months, which, on the one hand, obliges Mr. *Montague* to pay him his salary for nine months, and obliges Mr. *Flockton*, on the other hand, to perform for Mr. *Montague* for the same period, it is said, in order to avoid this, that he is not bound, because there is no negative stipulation in the contract. I certainly am under the impression that in the case of *Lumley* v. *Wagner* (1), if there had been no negative stipulation the Court would have interfered; and I gather this particularly from the passage in Lord *St. Leonards'* judgment (2), where he says: "The agreement to sing for the Plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though, beyond all doubt, this Court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." It happened that that contract did contain a negative stipulation, and, finding it there, Lord *St. Leonards* relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and granted the injunction, on the ground that Mdlle. *Wagner*, having agreed to perform at Mr. *Lumley's* theatre, could not at the same time be permitted to perform at Mr. *Gye's*. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point. It appears to me, on the plainest ground, that an engage-

(1) 1 D. M. & G. 604. (2) 1 D. M. & G. 618.

ment to perform for nine months at Theatre A. is a contract not to perform at Theatre B., or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre? I must treat Mr. *Flockton* as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract. There is no doubt whatever that the proper construction of these contracts is, that where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves the necessity of his or her not performing or singing at any other during that time.

That does not rest upon my opinion only, because it was acted upon in *Webster* v. *Dillon* (1). In that case there was, it seems, no argument on the part of the Defendant. I suppose they did not argue it because they found they could make nothing of it. The Defendant *Dillon*, an actor, having agreed to perform at *Sadler's Wells Theatre* in certain characters for twelve successive nights, proposed to perform during the same period at another theatre. Mr. *Swanston* applied for the injunction, and Vice-Chancellor Sir *W. Page Wood* "thought the words of Lord *St. Leonards* were sufficiently strong to justify his making the order, and he granted an injunction restraining the Defendant from acting at any other place than the Plaintiff's theatre during the ordinary hours of performance there of twelve consecutive nights, commencing on the 20th of April, the Plaintiff undertaking to abide by such order as to damages as the Court might direct." He fully adopts there the principle that it is not necessary to have a negative covenant in order to prevent the performance at another theatre. In *Fechter* v. *Montgomery* (2) I think all men must concur in the reasonableness

(1) 3 Jur. (N.S) 432. (2) 33 Beav. 22.

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of the views of the Master of the Rolls. Mr. *Fechter* had engaged Mr. *Montgomery*, who had been a provincial actor, and desired to appear on the *London* boards to perform *Shakespeare's* characters, and Mr. *Fechter* had kept Mr. *Montgomery* for five months idle, but he paid him his salary. Mr. *Montgomery's* object was to be occupied; he did not want to be kept idle, he wanted to shew his talents to *London* audiences, and it being clear that *Fechter* had kept him five months perfectly idle, and, for all that appeared, was likely to keep him idle for another five months, Mr. *Montgomery* would not submit to it, and broke his engagement. Mr. *Fechter* then filed a bill for an injunction, and in my opinion the Master of the Rolls could not have come to any other conclusion than that Mr. *Fechter* had broken his part of the contract, and therefore he would not enforce it as against *Montgomery*. The contract there did not contain any negative stipulation that he would not perform except for Mr. *Fechter*. The Master of the Rolls in that case says (1): "But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of the 21st of June, 1862, written to Mr. *Barnett*, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to me to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. *Fechter* to employ Mr. *Montgomery*, during a reasonable time, to act at this theatre, and that it was an agreement on the other side that he (Mr. *Montgomery*) should not perform elsewhere without the consent of Mr. *Fechter;* there was a mutuality in the agreement entered into on both sides; on the one side, that he should have an opportunity of displaying what his abilities and talents were before a *London* audience, and on the other side, that he should not act elsewhere unless with the permission of the Plaintiff." There are, therefore, Sir *W. Page Wood*, when Vice-Chancellor, and the Master of the Rolls, Lord *Romilly*, taking precisely the same view, that an engagement to act at one theatre is a prohibition against acting at any other. There is also the whole principle involved in the case of *De Mattos* v. *Gibson* (2), which was with regard to a totally different subject undoubtedly, namely,

(1) 33 Beav. 26.

(2) 4 De G. & J. 276.

the chartering of a ship. The ship was chartered for a particular voyage, and the charterer proposed to sell her, and employ her in a totally different manner. There the Court decided that there was a contract that she should not be employed for any other purpose, and granted an injunction against her being so employed accordingly. I think, therefore, that it is decidedly established, and I should desire, as far as my opinion is of value on the subject, that it should be considered my opinion, that a man agreeing to act in one particular theatre during the season is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed. Then the result is: here is a contract entered into for value. It is said by Mr. *Flockton* that the Plaintiff has refused to perform his part of the contract, and has also refused to allow him to perform. That is explained in the affidavits. It is not attempted to be answered. It is perfectly clear that, in consequence of *Flockton* having absented himself, and given the notice of the 2nd of October, when this new piece was about to be brought out, Mr. *Montague* was obliged to apply to another actor, a Mr. *Palmer*, to act in the place of Mr. *Flockton*, and that, in consequence of the default of Mr. *Flockton* to perform his contract, he has brought this trouble upon himself. Mr. *Montague* very properly said: "I have engaged Mr. *Palmer*: I cannot turn him out. You have brought this upon yourself, and while this piece lasts I cannot employ you to perform in it." But if he had not done that, I am perfectly clear that he would have continued to employ him there, and that the circumstance of his not being employed is entirely in consequence of his attempting to repudiate his own contract.

Under these circumstances, I am clearly of opinion that Mr. *Montague* has established that Mr. *Flockton* is under an engagement to perform for him, and, being under that engagement, is not at liberty to perform at any other theatre whatever without his permission. I think it is a matter of very great importance for actors to understand, that entering into a contract to perform at Theatre A. obliges them to perform there alone, and that they cannot be permitted to perform anywhere else so long as the other party performs his part of the agreement.

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I am, therefore, of opinion that Mr. *Montague* is entitled to the injunction.

Mr. *Hemming* asked that the injunction might not be extended to prevent Mr. *Flockton* from fulfilling the engagement he had already entered into to perform once more at the *Crystal Palace.*

The VICE-CHANCELLOR recommended Mr. *Montague* to concede this request as a favour.

Mr. *Glasse* said that Mr. *Montague* would not object to the Defendant's performing once more at the *Crystal Palace.*

The VICE-CHANCELLOR thereupon granted the injunction in the terms of the prayer, but so as not to interfere with Mr. *Flockton's* playing one more day at the *Crystal Palace.*

Solicitors for the Plaintiff: Messrs. *Lumley & Lumley.*
Solicitor for the Defendant: Mr. *Oakes.*

In re BIRD.

ORIENTAL COMMERCIAL BANK *v.* SAVIN.

[1872 B. 380.]

V.-C. B.
1873
May 23.

Executor, Liability of—Loss by Failure of Solicitor.

One of three executors having employed in proving the will the solicitor who was employed by the testatrix in making it, also employed the same solicitor to negotiate for the compromise of a debt due from the estate. The executor and the creditor were both living in *London*. In June, 1872, the solicitor wrote to the executor, informing him that a compromise had been effected of this particular debt for £260, and of another debt for £50, and asking for a cheque. The executor, on the 4th of July, sent a cheque for £310 to the solicitor, who paid it in to his own account.

The compromise, in fact, had not been effected, and the money was misappropriated; but the executor, having taken no step in the meantime, did not find out the loss until December, 1872:—

Held, that the £310 ought to be allowed to the executor.

ADJOURNED SUMMONS.

On the 28th of February, 1873, an application was made on the part of the Plaintiffs to proceed further with the accounts and inquiries directed to be taken and made by the order made in the matter and cause, dated the 7th of January, 1873, and that the Defendants, *William Birch Savin* and *George Frederick Stevens*, should, on or before the 1st of April, 1873, or within four days after service of the order, pay into Court the sum of £329 17*s.* 8*d.*, appearing by the affidavit of the Defendants *Savin* and *Frances Stevens*, filed the 22nd of February, 1873, and the accounts referred to thereby, to be in their hands, and forming part of the personal estate of *Frances Bird*, the testatrix in the matter and cause, and that the amount when so paid in might be invested.

Frances Bird, who died on the 19th of May, 1868, by her will dated the 1st of November, 1865, appointed the Defendants *Savin* and *Stevens* and his wife her executors and executrix. At the time of her death she was a contributory of the Plaintiffs, the *Oriental Commercial Bank*, and also of the *Caledonian Insurance Company*. The solicitor employed by the testatrix in making her will was one *William Hunt*, who was also employed by the Defendants to prove the will.

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In the latter part of 1869 a correspondence commenced between *Hunt* and a clerk of the Plaintiffs' solicitors. *Hunt* stated that the executors desired him to inform the Plaintiffs' solicitors that, as the estate was insolvent, they would be glad if the Plaintiffs would accept a sum less than the claim made. Plaintiffs' solicitors replied, offering to take £270 by way of compromise, but adding that any compromise would have to be sanctioned by the Court on the facts stated being proved by *Hunt*. In August, 1871, *Hunt* wrote, saying that he had sent by bearer drafts of proposed affidavits to be made as to the compromise. In answer, Plaintiffs' solicitors wrote to say that the affidavits were imperfect in several respects, especially that the account was wanting, and that it had not been shewn that the testatrix did not die possessed of real estate. The defects were never supplied, and the matter fell through.

On the 5th of December, 1870, the executors paid *Hunt* £26 8*s*. 2*d*. for the probate, and on the 13th they paid him a further sum of £25 19*s*. in discharge of his general bill of costs.

In June, 1872, the Defendant *Stevens* was informed by *Hunt* that the Plaintiffs had agreed to accept £260, and that the *London and Caledonian Insurance Company* had agreed to accept £50; and on the 11th of the same month *Hunt* wrote, asking for a cheque for £320, the additional £10 being a charge for further costs.

On the 4th of July, 1872, the Defendant *Stevens* sent to *Hunt* a cheque for £310, not thinking proper to pay the £10. This cheque was traced to *Hunt's* account at the *London and Westminster Bank*.

No further step was taken by the executors, and no inquiry made, until the 24th of December, 1872, when *Stevens* was served with the administration order in the suit in which the *Oriental Commercial Bank* were Plaintiffs. It was then discovered that the £310 had been misappropriated, and was irrecoverable.

The Defendant *Stevens* deposed that on the 4th of July, 1872, he and his wife were sworn to an affidavit which set out the particulars of the testatrix's estate and an account of receipts and payments.

The Chief Clerk having found a balance of £329 17*s*. 8*d*. due

from the executors, they now claimed to be allowed the £310 which had been paid to *Hunt*.

Mr. *Jackson*, Q.C., and Mr. *Macnaghten*, for the official liquidator of the bank:—

The question is simply whether a payment made by an executor to his solicitor is a valid payment against the creditors of the estate. We say it is not. There are cases where executors, trustees, receivers, and others having a fiduciary position, having trusted money to bankers, brokers, or, occasionally, solicitors, have been held to be discharged; but such payments must have come up to the description of cases of "reasonable necessity," or of the "ordinary course of business": *Clough* v. *Bond* (1).

In this instance the executor should have ascertained that the compromise had been really effected before he sent the money.

Even if the compromise had been effected, as the solicitor stated, was this a reasonable way of paying the money? Should not the executors have paid straight to the official liquidator in the one case, and to the party principally entitled in the other? Upon completion of a sale, a solicitor cannot receive the purchase-money so as to exonerate the purchaser without a written authority: *Viney* v. *Chaplin* (2); and so he cannot receive compromise money. The mode of payment in this instance should have been arranged beforehand with the liquidator: *Castle* v. *Warland* (3).

An executor must use due diligence: *Lord Shipbrook* v. *Lord Hinchinbrook* (4). Here he sent two amounts in one cheque; he sent to the solicitor, when he might have sent direct to the creditors; he sent the money before he was sure it was wanted; and he made no inquiry for five months; whereas, if he had inquired at first, probably no misappropriation would have taken place.

Mr. *Amphlett*, Q.C., and Mr. *Freeman*, for the executors:—

The rule as laid down in *Williams* on Executors (5) is, that where the payment is made "from necessity, or conformably to the common usage of mankind," the executor will not be held

(1) 3 My. & Cr. 490, 496.
(2) 2 De G. & J. 468, 482.
(3) 32 Beav. 660.
(4) 11 Ves. 252.
(5) 6th Ed. p. 1678.

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responsible. *Castle* v. *Warland* (1) is in our favour: so are *Bacon* v. *Bacon* (2); *Powell* v. *Evans* (3).

Mr. *Macnaghten*, in reply:—

In *Bacon* v. *Bacon* the money had to be remitted from the country; here the executor was living in *London*.

Sir James Bacon, V.C.:—

I quite agree with what has been said, that this would be a very hard case—in fact it is a very hard case in every way; but I wish it to be understood that my opinion is not in the least degree influenced by the hardness of the case. I have no right to entertain any such consideration. But I think, adopting the rule which is to be found in the cases that have been cited, and many other cases, that, although the Court holds an executor with the utmost strictness to the faithful discharge of his duty, unless it finds that he has by some gross negligence overstepped or forgotten the line of his duty, it is not the practice of the Court to charge him with sums which he is proved to have honestly paid, and for a proper purpose.

The facts of this case have been stated with the utmost fairness, I think, on both sides. I have not the least reason to doubt or distrust one word in the affidavits, or the statements on the part of the company that there was some talk about compromising this claim; that there was a suggestion as to £270 being accepted, and that there was—as was proper on the part of the solicitor for the liquidator—a desire to see the account as well as the affidavit. The account is referred to in the affidavit, not only by the schedule from which I read the particulars, but the account A. is a thing mentioned in the affidavit—"the account A. now produced and shewn to us." The company's solicitor at once, as a man of business, said the affidavit was defective and useless unless he saw that account. His request in that respect was not complied with by Mr. *Hunt*.

But the conduct of the executor is to be examined into. It seems to me that the executor has done just what any prudent man would think himself safe in doing. He finds (I am speaking

(1) 32 Beav. 660. (2) 5 Ves. 331.
(3) 5 Ves. 839.

of Mr. *Stevens'* affidavit when I say the executor) that the testatrix had in her lifetime employed Mr. *Hunt* as her solicitor; he had been employed as her solicitor upon various matters; his credit was not called in question; his ability was not doubted; he had arranged for her some other claims (she seems to have been an unfortunate shareholder), and when, after her death, a claim is made by these two companies, the *Oriental Commercial* and the *Caledonian*, naturally enough Mr. *Hunt* is employed to conduct the business, namely, the compromise of these claims; and the estate being, as it is not doubted, very small, indeed not sufficient to discharge all the burthens on it, the account the executor gives of it, having described the employment of Mr. *Hunt* as the testatrix's solicitor, is, that in the month of July, 1872, he was summoned to *London*, attended with his wife, and made the affidavit referred to; and Mr. *Hunt*, the man whose character and position I have been describing, stated that he had "arranged with the *Oriental and Commercial Company* to accept £260, and the *London and Caledonian Insurance Company* £50, making £310," &c. [His Honour read the passage.] Then the cheque is produced. If the common usage is to be referred to, what can be more common than the transaction described in that paragraph of the affidavit? Having employed this attorney to negotiate for a compromise, and being told by him, "I have got these terms for you, and £310 is payable," the executor puts into his hands the £310. What negligence is there in that? What incautious trusting to some other person's representation? It is all in the ordinary course of the business then being transacted, and I cannot think that the executor has neglected any caution which it was incumbent on him to exercise. That he did anything else that could be blamed is out of the question, and need not be observed upon.

I think the executor, having to protect the estate of his testatrix, having to satisfy out of it to the last shilling all it would yield, has discharged his duty in that respect, although he has been unfortunate, and the estate has suffered from the fact that *Hunt* was trusted. At the time he was trusted, he was of good repute; he has since been found not to be trustworthy, but that is no reason why the executor should be fixed with this £310 which he is proved to have paid over.

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Mr. *Macnaghten* imputed to the executor a piece of neglect in not drawing two cheques. I do not know that two cheques would, in the ordinary course of business, be considered necessary, or that it was a necessary consequence that the one cheque should go into Mr. *Hunt's* account. If Mr. *Hunt* had discharged his duty in the ordinary way, he would have sent his clerk to the bankers, would have got the £310, and have paid the £260 at one place and the £50 at the other.

The order will be that, the Court being of opinion that the £310 ought to be allowed, the summons be discharged. The costs of both parties will be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Upton, Johnson, Upton, & Budd.*

Solicitors for the Defendants: Messrs. *Fuller & Saltwell.*

V.-C. B. 1873 *June* 4.

SIMPSON *v.* PEACH.

[1872 S. 195.]

Will—Construction—Gift of Personalty "payable" at the Death of A. to a Class—Shares to be "vested" on majority or marriage, and Income in the meantime to be paid towards Maintenance—No Gift over—"Vested" held to mean "Vested in Possession."

Testatrix gave a legacy of £4000, "payable" at the decease of *A.* to a class of persons, to be equally divided amongst them, share and share alike, the said shares to be "vested" interests on majority or marriage, and the income, in the event of *A.'s* death in the meantime, to be paid towards the maintenance and education of such persons. There was no gift over. Two of the class survived *A.*, and died under twenty-one:—

Held, that by the word "vested" was meant "vested in possession," and that the shares of the deceased minors passed to their legal personal representatives.

MOTION FOR DECREE.

Jane Eliza Simpson, spinster, died on the 1st of February, 1849, having by will, dated the 12th of December, 1848, appointed her sister *Maria Simpson*, and *Thomas Peach*, her executrix and executor, and having bequeathed as follows:—

"I give the sum of £4000, payable at the decease of my sister,

to the brothers and sisters of the said *Stephen Francis Simpson*, to be equally divided amongst them, share and share alike, the said shares to be vested interests on the majority or marriage of each, and the interest and income thereof, in the event of my sister's decease in the meantime, to be paid towards the maintenance and education of such child or children." The testatrix then gave the residue of her personal estate to her sister *Maria Simpson*.

At the testatrix's death there were nine brothers and sisters of *Stephen Francis Simpson*, all of whom survived testatrix's sister *Maria Simpson*, who died on the 16th of December, 1856, having by will appointed *Hasler Hollist* and *Henry John Peach* her executors.

In 1860 one of the brothers of *S. F. Simpson*, named *Charles Burrowes Simpson*, took the benefit of the Insolvent Debtors Acts, and by an order dated the 16th of March, 1860, all his real and personal estate were vested in *Samuel Sturgis*, as provisional assignee.

On the 30th of July, 1863, *Rowland Simpson*, one of the brothers of *S. F. Simpson*, died under age and unmarried.

On the 8th of March, 1864, *Charles Burrowes Simpson* died.

On the 2nd of June, 1864, *Gertrude Simpson*, one of the sisters of *S. F. Simpson*, died, also under age and unmarried.

On the 11th of July, 1864, another provisional assignee of the estate of *Charles B. Simpson*, in the room of *S. Sturgis*, was appointed by a general order of the Court of Bankruptcy.

On the 9th of September, 1866, *Eleanor Simpson*, another sister, died, of full age; and in 1867 administration with the will annexed, of her estate, was granted to her father, *Charles Simpson*.

In June and July, 1869, letters of administration to the estates of *Gertrude* and *Rowland Simpson* were granted to their father, *Charles Simpson*.

In July, 1872, this bill was filed by *Charles Simpson*, the father, against *Thomas Peach*, the surviving executor of the will, five of the sisters of *S. F. Simpson*, all of whom had attained twenty-one, the provisional assignee, and the executors of *Maria Simpson*, stating that seven of the shares had been paid and transferred to the respective owners, and that there was still standing in the bank in the name of the Defendant *Thomas Peach* a balance of £898 9*s*. 9*d*.

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representing the shares of the two children who died under age; and praying that the rights and interests of all parties in this sum of £898 9*s.* 9*d.* stock might be ascertained and declared.

Mr. *Rigby*, for the Plaintiff:—

The Plaintiff is entitled to these shares as administrator to the minors.

The question turns upon the meaning of the word "vested." Of this word the meanings are three. It means either, 1, simply "not contingent," *i.e.* transmissible to representatives; or, 2, "indefeasible," which is out of the question here, as there is no gift over; or, 3, "vested in possession." It is submitted that this last is the true meaning here; that is to say, that the shares became vested in interest at the death of the sister *Maria Simpson*, but not vested in possession till the attainment of twenty-one or marriage: *Saunders* v. *Vautier* (1); *In re Parr's Trusts* (before V.-C. *Bacon*, July 1, 1871); *Williams* v. *Haythorne* (2).

Mr. *A. T. Watson*, for the Defendant *Thomas Peach*.

Mr. *Dryden*, for the five sisters:—

The word "vested" must bear its usual technical meaning. I agree that there was no intestacy, but I contend that "vested" must mean "vested in interest;" so that until twenty-one or marriage no brother or sister took anything.

The words "payable" and "vested" in this will are not in any way connected or grouped together as in *In re Parr's Trusts*.

Amongst the authorities are *In re Arnold* (3); *Glanvill* v. *Glanvill* (4); *Comport* v. *Austen* (5); *Russel* v. *Buchanan* (6); *In re Colley's Trusts* (7).

Mr. *Langley*, for the official assignee.

Mr. *Herbert Smith*, for the executors of *Maria Simpson*:—

The view taken by the executor is, that these two shares were undisposed of, and fall into the residue: *Wakefield* v. *Dyott* (8); *Glanvill* v. *Glanvill*.

(1) Cr. & Ph. 240.
(2) Law Rep. 6 Ch. 782.
(3) 9 Jur. (N.S.) 1186.
(4) 2 Mer. 38.
(5) 12 Sim. 218, 246.
(6) 7 Ibid. 628.
(7) Law Rep. 1 Eq. 496.
(8) 7 W. R. 31.

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SIR JAMES BACON, V.C.:—

Mr. *Rigby*, I will not trouble you to reply.

In my opinion the construction is clear. The direction in the first instance is clear and distinct, that upon the death of testatrix's sister a sum of £4000 is to be "payable" to the brothers and sisters of *Stephen Francis Simpson*. The notion that upon the death of a brother or sister before attaining twenty-one or marriage his or her share is to fall into the residue is out of all sight —out of all probability. There is not the slightest ground for imputing to the testatrix any such intention.

The testatrix directs that the shares are to be "equally divided amongst" the brothers and sisters "share and share alike," and then come the words upon which all the argument has been attempted to be raised; "the said shares to be vested interests on the majority or marriage of each, and the interest and income thereof, in the event of my sister's decease in the meantime, to be paid towards the maintenance and education of such child or children."

By these words, in my opinion, a clear vested interest—vested at law—vested by right—was conferred upon each of these brothers and sisters, all of whom survived the testatrix's sister; although the testatrix, contemplating the probability of some one or more of them not attaining twenty-one or living to be married, postponed the actual payment of the capital of each share until the attainment by each child of twenty-one or marriage.

If the case were not governed by authority, I should have felt bound to hold that to be the true construction of the will; but in the face of the judgment of Lord Chancellor *Hatherley* in *Williams* v. *Haythorne* (1) there can really be no question.

The result will be that the shares of the two children who died under twenty-one pass to the Plaintiff as their legal personal representative.

The costs of all parties must come out of the fund.

Solicitors: Messrs. *Cole, Cole, & Jackson*; Mr. *A. S. Twyford*; Messrs. *Rickards & Walker*.

(1) Law Rep. 6 Ch. 782–786.

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1873
June 3.

MIDDLETON *v.* WINDROSS.

[1871 M. 207.]

Will—Hotchpot Clause—Condition—Election.

A testator gave all his property equally among his three daughters, *S.*, *M.*, and *J.*, and directed *J.*, within twelve months after attaining twenty-one, to bring into hotchpot an estate (B.) to which she was separately entitled. On her marriage, subsequently to the date of the will, her estate, at the testator's instance, was settled on herself for life, remainder to her husband for life, remainder as she should appoint among her children, and was subsequently, also by the testator's advice, sold, and the proceeds held on the same trusts. In a suit to administer the testator's estate:—

Held, that *J.* must bring into account the proceeds (less the costs of sale) of estate B.

WILLIAM MIDDLETON, by his will, dated the 22nd of February, 1853, after giving an annuity to his wife, and subject thereto, devised and bequeathed all his real and personal estate whatsoever unto and equally between and among "all my children who shall live to attain the age of twenty-one years or die under that age leaving lawful issue, and if there shall be but one such child, then to such only child, and their, his, and her heirs, executors, and administrators absolutely for ever." Then followed this proviso: "And whereas my daughter *Jane* is entitled under the will of her grandfather to an estate called *Bowbridge*, in the county of *Cumberland*, Now it is my wish that the said estate shall be brought into hotchpot by my said daughter *Jane* with my other children, and I direct and enjoin her my said daughter *Jane*, within twelve months after her attaining twenty-one, to convey and assure the said estate so and in such manner that the same may become the property of all my children, and may be held and enjoyed by them as if the same had been my own absolute property and had passed by this my will."

The testator had three children, *Jane*, *Sarah Hannah* (the Plaintiff), and *Margaret*. *Jane*, in 1865 (after the date of the will), married the Defendant, *Rodolphe Schmid*, and on her marriage a settlement, at the instance and under the superintendence of the testator, was made of the *Bowbridge* estate upon trusts for

the benefit of the wife, *Jane Schmid,* for life, without power of anticipation, remainder to her husband for life, remainder as the wife should appoint among the children who should attain twenty-one, their heirs and assigns. In 1866 the *Bowbridge* estate was sold by the trustees of the settlement by the advice of the testator, and realized £3000 net, which was invested on two mortgages. Mr. and Mrs. *Schmid* had two children born before the testator's death and one subsequently. One of the children died in 1866.

The testator died on the 6th of February, 1867, and on the 28th of October, 1871, this bill was filed to administer the testator's estate, and the usual decree was made on the 23rd of March, 1872. On the 26th of January, 1873, the Chief Clerk made his certificate, from which it appeared that the testator's real and personal estate was of the value of £10,295 0*s.* 11*d.*

Mr. *Dickinson,* Q.C., and Mr. *Roberts,* for the Plaintiff:—

The intention apparent on the face of the will is, that each of the three daughters should share equally in the testator's property, provided the *Bowbridge* estate is brought into hotchpot. The words amount to a condition that *Jane* shall bring *Bowbridge* into hotchpot as the terms on which she is to share equally with her sisters in the testator's estate. It is a perfectly good condition. Or if the language of the will put her to her election, it is equally free from objection. The testator substantially treated the *Bowbridge* estate as his own property, and his will proceeded on that principle. In either case the daughter *Jane* is bound to give effect to the intention of the will.

Mr. *Karslake,* Q.C., and Mr. *Mounsey Heysham,* for the daughter *Jane*:—

If the language of the will amounts to a condition precedent or subsequent, the Plaintiff's claim must fail, because by a transaction to which the testator was a party the condition became impossible. It was by the direction of the testator, and under his superintendence, that the *Bowbridge* estate was settled on the marriage of his daughter, and her interest cut down to a life estate. But where a condition becomes impossible by the act of

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the testator the legatee holds the legacy discharged of the condition. But suppose it is a case of election, the only interest the daughter had at the time the will came into operation was a life estate. Her husband and her children took no interest under the will, and could surrender nothing under the settlement.

The true construction, however, was neither condition nor election but *quasi* ademption. This is a case *primæ impressionis*, and there are no authorities exactly in point, but the cases most resembling it are *Langslow* v. *Langslow* (1) and *Plowden* v. *Hyde* (2), where the Court held that there was no election.

Mr. *Romer*, for the children of Mrs. *Schmid* :—

This is a clear case of condition, but the testator having by his own act made the condition impossible, the legatee holds the property discharged of the condition: *Walker* v. *Walker* (3).

Mr. *Everitt*, Mr. *Stallard*, and Mr. *Hull*, appeared for other parties.

SIR JOHN WICKENS, V.C.:—

The object of the testator was to divide his property equally between his three daughters, but, unfortunately, the machinery he selected for that purpose failed in consequence of his daughter, Mrs. *Schmid*, having settled the *Bowbridge* estate, as it might have failed from a variety of causes. Notwithstanding that failure, the Court has ample means by which it can give effect to what was the undoubted intention of the testator, and is bound to use them. With regard to the case of *Walker* v. *Walker*, which has been cited, the report is very meagre, and I cannot help thinking that the decision turned a good deal on the request referred to in that case; but be that as it may, I do not think it applies to the present. There must be a declaration that the £3000 obtained from the sale of the *Bowbridge* estate (less the costs of the sale) must be brought into account in respect of Mrs. *Schmid's* share, and decree accordingly. Costs of all parties, as between

(1) 21 Beav. 552. (2) 2 Sim. (N.S.) 171, 175.
(3) 29 L. J. (Ch.) 856.

solicitor and client, to be paid out of the estate. There must be a partition or sale if the parties desire it.

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Solicitors for the Plaintiff and several Defendants: Messrs. *Helder & Roberts.*

Solicitors for the other Defendants: Messrs. *Gray & Mounsey.*

Ex parte MURRAY. *In re* FORREST.

C. J. B. 1873 *June* 14.

Liquidation—Special Resolution—Registration—Amount of Stamp Duty—Surplus of Assets over Debts—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 55, 125, *sub-s.* 4—*Bankruptcy Rules*, 1870, *r.* 274—*Order regulating Fees of* 10*th August*, 1871, *Table A.*

Where the assets of a liquidating debtor exceed his debts stamp duty upon the registration of the special resolution of the creditors is not payable on any amount exceeding the sum estimated as necessary to pay all the creditors in full.

THIS was an appeal from a decision of the Judge of the County Court at *Blackburn.*

William Forrest, a cotton spinner at *Blackburn*, filed a petition for liquidation or composition in the County Court at *Blackburn* on the 17th of March, 1873. The first meeting of the creditors was held on the 8th of April, when a liquidation by arrangement was duly resolved upon, and *Adam Murray* was appointed trustee. The statement of the debtor's affairs produced at the meeting shewed that he estimated his debts at £36,221 12*s.* 2*d.*, and his assets at £75,841 2*s.* 10*d.*, shewing a surplus of £39,619 10*s.* 8*d.* The resolution was tendered to the Registrar for registration, accompanied by an affidavit made by the trustee (according to the Form No. 127 given in the schedule to the *Bankruptcy Rules*, 1870), in which he deposed: "I verily believe, after inquiry made by me, and to the best of my knowledge, information, and belief, that the amount of the assets to be distributed amongst the creditors in this matter does not exceed £36,300." The resolution was stamped with a stamp for £90 15*s.*, being at the rate of 5*s.* per cent. upon £36,300. The Registrar refused to register the resolution on the ground that it should have been stamped with an amount corre-

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sponding to £75,841, the estimated amount of the assets. The Judge affirmed this decision, and the trustee appealed.

Mr. *Winslow*, for the Appellant:—

The Registrar thought that by the Act and the Rules the meaning of the word "assets" was extended so as to mean the same thing as the "property" of the bankrupt, which is defined by the Act, sect. 15, and that the stamp duty which is imposed by the Order of the 10th of August, 1871, at the rate of 5*s.* per cent. "on the gross amount of the estimated assets," must be payable on the gross amount of assets or property included in the debtor's statement, irrespectively of whether the property is or is not estimated by the debtor as more than enough to pay the creditors in full. The primary meaning, however, of the word "assets" is that which is enough to pay the creditors, and it could not have been the intention of the Legislature to impose a fine upon a debtor who happens to have a surplus. Moreover, the Order of the 10th of August, 1871, provides that in the case of a composition the duty shall be payable "on the gross amount of the composition," and in the case of a bankruptcy it provides that the duty shall be paid "on the gross amount of the assets realized and brought to credit." As soon as a trustee in bankruptcy had paid all the creditors in full it would be his duty not to realize any more of the bankrupt's property, but to hand it back in specie to the bankrupt. The duty must have been intended, in the case of a surplus, to be paid only on the amount estimated as necessary to pay the creditors in full, or at any rate, the only addition should be for the estimated costs of the liquidation.

[SIR JAMES BACON, C.J.:—How can they be estimated?]

In the case of deeds under the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134) s. 195, no stamp duty was payable on a surplus.

No one appeared in opposition to the appeal.

SIR JAMES BACON, C.J.:—

There is, no doubt, some obscurity in the Rules. The 3rd subsection of sect. 125 of the Act requires that the debtor shall produce to the meeting of his creditors a statement shewing the whole

of his assets and debts. Then by sub-sect. 4 the duty is imposed on the Registrar, if satisfied that a special resolution has been duly passed, of registering the resolution and the statement of the assets and debts of the debtor. The Form No. 127 in the schedule to the Rules of 1870 provides that an affidavit shall be made by the debtor, or by the trustee or some person able to depose thereto, of the "computed amount of estimated assets." In the present case the trustee has made this affidavit, pledging his oath that to the best of his belief, after inquiry made, the amount of the assets to be distributed amongst the creditors does not exceed £36,300. Then come the provisions of Table A in the Order of the 10th of August, 1871, as to the stamp duty payable upon the registration of the resolution, and there the "gross amount of the estimated assets" is spoken of. The Act speaks of the "whole of the assets" of a liquidating debtor, and of the "property" of a bankrupt. In bankruptcy proceedings the bankrupt must give an account of the whole of his property, and in liquidation proceedings the debtor must give an account of the whole of his assets. Under a liquidation an affidavit is required of the computed amount of estimated assets, in order that the "gross amount of the estimated assets" may be subject to a certain duty. Here the trustee swears that, having regard to the amount of the debts, the amount of the assets to be distributed among the creditors does not exceed £36,300. Upon that sum, and upon no other, I think the duty is payable, and I am fortified in that opinion by the fact that the same Order provides that, in the case of a bankruptcy, duty is to be paid upon the gross amount of assets realized and brought to credit. The expression "gross amount of the estimated assets" is certainly an unfortunate one, but looking at the Act and the Rules together, and having regard to the provisions of the Act of 1861 with respect to the stamp duty to be paid upon deeds of arrangement, I think the intention was that in a liquidation the duty should be payable upon no larger amount than that which is necessary to satisfy the debts. I think the trustee in this case has complied with the law, and that it is the duty of the Registrar to register the resolution with the stamp which has been affixed to it.

Solicitors: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman, & Seddon, Manchester.*

C. J. B.

1873

June 14.

Ex parte COCKAYNE. *In re* COCKAYNE.

Liquidation Petition—Debtor's Statement of Assets and Debts—Distinction between Joint and Separate Assets and Debts—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 103, 104, 125, *sub-s.* 3—*Bankruptcy Rules*, 1870, *rr.* 285, 286, 287.

10 Ch 382-3-4-6
2 Ch D. 329 331
332.
7 Ch D 17.
16 Ch D. 515.

A debtor filed a liquidation petition describing himself as carrying on business alone. He had formerly been in partnership, but the partnership had come to an end more than a year before the petition was filed. There were debts of the firm remaining unpaid. The debtor's statement did not shew which were his joint and which were his separate assets or debts, and on this ground the Registrar refused to register the resolutions which the creditors passed for liquidation by arrangement, though all the creditors had had notice of the meetings, and no one objected to the registration. The Judge of the County Court affirmed the decision of the Registrar:—

Held, on appeal, that the Registrar's decision was right.

THIS was an appeal from a decision of the Judge of the County Court at *Nottingham*.

From the 1st of July, 1868, to the 31st of December, 1871, Mr. *B. H. Cockayne* carried on business as a solicitor and attorney at *Nottingham* in partnership with Mr. *C. H. Talbot*, under the firm of *Cockayne & Talbot*. This partnership was dissolved by effluxion of time on the 31st of December, 1871, of which fact notice was given in the *London Gazette* of the 5th of January, 1872. After this *Cockayne* carried on business alone until the 24th of February, 1873, when he filed in the County Court a petition for liquidation or composition. In this petition he was described as "of the town of *Nottingham*, solicitor and attorney." A meeting of the creditors was convened for the 17th of March, notice being sent to every creditor mentioned in the list filed by the debtor with the petition. This list, in fact, included both the creditors of the late firm and the separate creditors, but did not shew which were joint and which were separate creditors. The statement of debts and assets produced by the debtor at the meeting included his joint as well as his separate creditors, and his joint as well as his separate assets, but did not distinguish between the joint and separate debts or between the joint and separate assets. The creditors assembled at the meeting resolved by the proper ma-

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jority upon a liquidation by arrangement, and appointed a trustee and a committee of inspection. The Registrar, when the resolutions were tendered to him for registration, refused to register them, on the ground that distinct resolutions ought to have been passed by the joint and the separate creditors, and that the statement ought to have distinguished between the joint and separate debts and assets, whereas the proceedings on the face of them appeared to relate to separate debts and separate estate only. This decision was affirmed by the Judge, and the debtor appealed. No creditor opposed the registration.

Mr. *Finlay Knight,* for the Appellant:—

The Act (sect. 125) does not say that the debtor's statement shall distinguish which of his assets or which of his debts are joint and which separate. The debtor in this case has sworn that all his creditors have had notice, and no one objects to the registration. Under a liquidation every creditor has express notice of the meetings. Rule 287 provides that when an individual debtor petitions, "his creditors and debts shall be deemed to be and include not only those creditors to whom or those debts in respect of which he is individually responsible, but also those creditors and debts to whom or in respect of which he is also responsible jointly with any other person or persons; and the statutory majority required for the purpose of any resolution shall be a collective majority of the whole of such joint and separate creditors assembled at any meeting."

[He also referred to sections 103 and 104 of the Act, and to Rules 285 and 286.]

No one appeared in opposition to the appeal.

SIR JAMES BACON, C.J.:—

These proceedings are as plainly wrong as anything can be. It is the duty of an insolvent debtor who desires to avail himself of the liquidation clauses to file a statement shewing the amount of his assets and who are his creditors. The statement which this debtor has filed does not distinguish between his separate and his joint creditors, nor between his separate and his joint assets. The

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trustee has no means of ascertaining which they are. It is the trustee's duty to keep distinct accounts of the joint and separate estates, and he cannot do this unless the debtor's statement gives him the necessary information. These proceedings are utterly wrong, and directly opposed to the Act and the Rules. The decision of the Registrar was quite right. The law is not complied with unless the debtor by his statement shews what part of his estate is separate and what part is joint, and which of his creditors are joint and which are separate. The appeal must be dismissed, but without prejudice to the summoning of a new meeting of the creditors upon a proper statement being filed.

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Solicitors: Messrs. *Linklater & Co.*, agents for Mr. *D. W. Heath, Nottingham.*

In re PEEK'S TRUSTS.

V.-C. M.
1873
Feb. 28;
March 21.

Will—Construction—Period of Vesting—Deferred Payment—Gift of Income for Maintenance—Right to Unapplied Income.

A testator gave a sum of £5000 to trustees upon trust to invest, and to apply the income to or for the maintenance of a nephew till he should attain his age of twenty-four years, and directed that when he attained that age the principal sum should be paid to him, and he made a gift over in case of the death of the nephew under that age.

The legatee was an infant at the testator's death, and died an infant some years afterwards. The trustees raised the fund, and applied part of the income to his maintenance and education, and at his death they had in their hands an accumulation of income unapplied :—

Held, that the legacy was vested at the testator's death, subject to be divested in the event which happened of the death of the legatee under the specified age, and that the whole of the income belonged to him during his life, and that his personal representative was entitled to the accumulations.

SAMUEL PEEK, by his will, dated the 19th of May, 1857, after directing his trustees thereby appointed after his decease to raise out of his personal estate, or, if the same should be insufficient, then out of his real estate, the sum of £5000, and to invest the same, provided for its application in the following words: "And do and shall pay and apply the interest, dividends, and annual produce thereof to and for the maintenance and education of my nephew, *Harry Hazlewood Peek*, until he shall attain the age of twenty-four years. And when and so soon as my nephew shall attain his said age of twenty-four years, I direct that the said principal sum of £5000, or the stock, funds, or securities wherein the same may be then invested, shall be paid, assigned, or transferred to my said nephew: Provided always, and I declare my will to be, that in case my said nephew shall die under the age of twenty-four years, then I direct that my trustees or trustee for the time being do and shall stand possessed of the said principal sum of £5000, and the securities whereon the same may for the time being be invested, upon trust for all such of the children of my said sister *Ann Robinson* as shall be living at the time of my decease who shall live to attain the age of twenty-one years."

In case there were no such children, the testator directed that

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the £5000 should sink into the residue. He further directed that, in certain events which did not happen, his residuary estate should be held on trust for his nephew *Harry Hazlewood Peek*, "to be applied and disposed of for his benefit during his minority upon the same trusts, with the same powers as to maintenance and education, and to be conveyed, assigned, and paid over to him at the same time in all respects as is hereinbefore directed or declared in his favour with regard to the sum of £5000 hereinbefore directed to be put in trust for him."

The testator died on the 20th of August, 1857, his nephew *Harry Hazlewood Peek* being then about ten years of age. The £5000 was raised, and parts of the income applied from time to time for his maintenance till his death, which took place on the 3rd of June, 1863.

The trustees had then in their hands a sum of £475 2*s.*, consisting of income on the £5000 which had not been required or applied for the maintenance and education of the legatee.

This sum, which, together with accumulations of interest, amounted to £658 5*s.* 4*d.*, was, on the 22nd of July, 1872, paid into Court by the trustees under the *Trustee Relief Act.*

The fund was now claimed by the legal personal representative of the legatee, by the children of Mrs. *Robinson*, and by the residuary legatee of the testator.

Petitions had been presented by both the legal personal repre-representative of the legatee and by the residuary legatee of the testator.

The arguments took place partly on the 28th of February and partly on the 21st of March.

Mr. *Badcock*, for the residuary legatee of the testator:—

The proper construction of this will is that the unapplied income falls into the residue. Reading the whole will together, and particularly the last part, where the provisions for the maintenance of the legatee are called powers, it is clear that the testator intended only to give a power of maintenance out of the income, not to give the whole income to him. Then any unapplied balance is not otherwise disposed of except by the residuary gift.

It cannot form an accretion to the corpus of the fund, because the class to take that fund cannot be ascertained till after the death of the legatee: *In re Ashmore's Trusts* (1). It is clear from such cases as *Leake* v. *Robinson* (2), and *Livesey* v. *Livesey* (3), that the unapplied income must fall into the residue.

Mr. *Shapter*, Q.C., and Mr. *Stallard*, for the legal personal representative of the nephew:—

This is clearly a vested legacy, liable to be divested in case the legatee does not attain the specified age. Such cases as *Bird* v. *Maybury* (4), *Pulsford* v. *Hunter* (5), and *Fonereau* v. *Fonereau* (6) are instances in point. The distinction between the cases is that where there is an express gift of the corpus of a fund, though payable at a future time, and the income in the meantime is given, the legacy is vested at the death of the testator, liable to be divested in case the legatee does not attain the specified age. Here the whole of the income is given for maintenance.

[The VICE-CHANCELLOR referred to *Batsford* v. *Kebbell* (7).]

In that case, as in *Livesey* v. *Livesey*, and *Watson* v. *Hayes* (8), there was no present gift of the corpus, and that is the real distinction between them and cases like the present, and they are, in fact, distinguished on that ground in *In re Hart's Trusts* (9).

Mr. *Freeling*, for the children of Mrs. *Robinson*:—

The only consistent way of reading *Batsford* v. *Kebbell* is to treat it as if there were two gifts of £500. That case, however, does not really affect the present question. This is a case of a legacy severed from the estate, and then the income directed to be applied for a purpose which does not exhaust it, and in that case the unexhausted income must go with the *corpus* of the fund: *In re Sanderson's Trust* (10). The legacy is clearly severed from the estate on the principles laid down in *In re Hart's Trusts*, which is so far an authority, though it does not further govern this case.

(1) Law Rep. 9 Eq. 99.
(2) 2 Mer. 384.
(3) 3 Russ. 287.
(4) 33 Beav. 351.
(5) 3 Bro. C. C. 41o.
(6) 3 Atk. 645.
(7) 3 Ves. 363.
(8) 5 My. & Cr. 125.
(9) 3 De G. & J. 195.
(10) 3 K. & J. 497.

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Mr. *Shapter*, in answer to a question by the Court, referred to *Hammond* v. *Maule* (1), *Murray* v. *Addenbrook* (2), *Westwood* v. *Southey* (3), *Boulton* v. *Pilcher* (4), *Bree* v. *Perfect* (5), *Whitter* v. *Bremridge* (6), *Vawdry* v. *Geddes* (7), *Davies* v. *Fisher* (8), *In re Bartholomew* (9), *Harrison* v. *Grimwood* (10), *In re Smith's Will* (11), and *Hobbs* v. *Parsons* (12), as instances in favour of an immediate vesting of the legacy.

Mr. *Robinson*, for the surviving trustee, who paid the money into Court.

SIR R. MALINS, V.C., after reading the will, and referring to the facts, continued:—

The authorities on the rules of construction applicable to this case are very numerous, but the case must be decided according to the intentions of the testator. There are some points which are perfectly clear. The corpus can only be received by the legatee in case he attains the age of twenty-four. But the question here depends upon whether, according to the rules of the Court, this is a vested legacy liable to be divested, or only a contingent legacy. All the cases, from *Hanson* v. *Graham* (13) downwards, go upon the same principle, that where a legacy is given to be paid at a particular age, and the whole income is given in the meantime, that gives a present vested interest. If the legatee had attained the specified age, he would have been entitled to the legacy absolutely. He cannot have the capital, because in the event which has happened it is given over, but I can see no reason why he should not have the whole income during the time his interest lasted. If he had survived the period of payment he could have compelled the trustees to pay the whole to him. I agree, therefore, that this is a legacy vested, but liable to be divested.

(1) 1 Coll. 281.
(2) 4 Russ. 407.
(3) 2 Sim. (N.S.) 192.
(4) 29 Beav. 633.
(5) 1 Coll. 128.
(6) Law Rep. 2 Eq. 736.
(7) 1 Russ. & My. 203.
(8) 5 Beav. 201.
(9) 1 Mac. & G. 354.
(10) 12 Beav. 192.
(11) 20 Ibid. 197.
(12) 2 Sm. & Giff. 212.
(13) 6 Ves. 239.

But I do not desire to rest the case on that ground alone. There are two subjects of gift. There is, first of all, the gift of the legacy, payable at a particular time; and then there is the gift of the income for the benefit of the legatee in the meantime. Where this is the case the legacy is treated as being vested, and the payment only postponed. I think *Batsford* v. *Kebbell* (1) and *Watson* v. *Hayes* (2) are applicable, as shewing the distinction between vested and contingent gifts. In those cases there was no gift of the corpus till the time for payment, and that distinction was relied on in *In re Hart's Trusts* (3), for the Lord Justice *Turner* there refers to those cases, and, commenting on them, says as to the former, that "the Court seems to have proceeded on the marked distinction between the dividends and the capital," and on the latter, that it was treated "as a gift, not of interest, but of maintenance only."

I think it is not immaterial in the present case that the payment is postponed beyond the usual age, and on this ground reason seems to require that the interest should be treated as one distinct subject of gift, and the capital as another.

On both grounds, therefore, I think that the entire income was given for the benefit of the testator's nephew, and the unapplied portion is payable to his representative. The order will, therefore, be according to the prayer of the Petition of his representative.

Solicitors: Messrs. *Hill & Son;* Messrs. *Vizard, Crowder, & Co.;* Messrs. *Druce, Sons, & Jackson.*

(1) 3 Ves. 363. (2) 5 My. & Cr. 125.
(3) 3 De G. & J. 195.

V.-C. M.
1873
May 8.

MOSELEY *v.* SIMPSON.

[1871 M. 93.]

Arbitration—Award—Irregularity—Misconduct and Corruption—Waiver—Arbitrators and one Party lunching together—Costs.

Certain matters in dispute were referred to three arbitrators, one to be chosen by each of the parties, and one by the two so chosen. On several occasions during the arbitration one of the parties provided luncheon at his expense, of which the arbitrator appointed by him and the third arbitrator, as well as his solicitor and one or two other persons, partook in the absence of the other party (who would not sit at the same table with his adversary) and of his arbitrator:—

Held, that, inasmuch as it was not shewn that the parties were influenced by corrupt motives, or were affected by the luncheons, the award could not be set aside on the ground of the luncheons.

Irregularities in the mode of conducting an arbitration may be waived by continuing the arbitration after they have been discovered.

A reference was made to three arbitrators, one to be appointed by each of the parties, and one by the arbitrators so chosen. The parties selected their arbitrators, and they selected another whom they erroneously appointed as umpire, and the sittings were commenced without him:—

Held, that the irregularity was waived by commencing the proceedings *de novo* after the mistake was discovered, and by an agreement signed by the parties by which they agreed not to impugn the award on any ground.

THIS was a motion by the Plaintiff in the suit to set aside an award made the 10th of March, 1873, by which the matters in dispute in the suit and in certain actions at common law between the parties were referred to arbitration under the following circumstances:—

The Plaintiff in the suit, Mr. *Moseley*, had, on the death of his brother in 1867, succeeded to a long-established business in *King Street, Covent Garden*. In the year 1868 he required further capital to carry on the business, and, after some fruitless efforts in other quarters, obtained a loan from the Defendant, Mr. *Simpson*. By way of security it was ultimately arranged that the Defendant, who was not previously in business of that kind, should become a partner in the business, the amount lent by him being treated as his share of the capital. The arrangements for the partnership

were carried out by an agreement of the 5th of February, 1868, and completed by a deed of the 16th of May, 1868. The partnership so constituted continued till the 18th of November, 1869, when it was dissolved under an agreement, by virtue of which the business was in future to be carried on by the Defendant alone, Mr. *Moseley* retiring upon certain terms. The agreement provided, amongst other things, that a formal deed should be prepared to carry it into effect.

Before the dissolution of the partnership disputes had arisen between the partners, and certain actions were commenced, and ultimately the Plaintiff filed the bill in the present suit, which prayed, in the alternative, either that the agreement of the 18th of November, 1869, might be specifically performed, or that an account might be taken of the dealings and transactions of the partnership between the Plaintiff and Defendant.

It was subsequently arranged that all matters in dispute should be referred to the arbitration of three arbitrators, one to be chosen by each of the parties, and one by the arbitrators so chosen. The Plaintiff selected as his arbitrator a Dr. *Ellis*, and the Defendant selected a Mr. *William Turner*, and an agreement of reference was entered into the 19th of June, 1872, and signed by both parties, by which they agreed to abide by and perform the award, order, arbitrament, final end and determination of Dr. *Ellis* and Mr. *Turner*, and of such third person as should be chosen by them to arbitrate, adjudge, and determine jointly with them or any two of them of and concerning all the matters in difference between the parties, so as the award of the said arbitrators or any two of them should be made in writing on or before the 31st of August, 1872, or such subsequent day as the arbitrators or any two of them should by writing under their hands appoint; and which award of the said Dr. *James Ellis* and the said *William Henry Turner* and such third person as aforesaid, or any two of them so made as aforesaid, should be binding, final, and conclusive upon the said parties thereto and their respective executors and administrators, and should be observed and performed by them in all things; and it was provided that the parties should be at liberty to move to make the submission a rule of the Courts of Chancery and Queen's Bench.

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A document in the following terms was afterwards signed by the two arbitrators:—

"We, Dr. *James Ellis* and *William Henry Turner*, the above-named arbitrators, in a submission to arbitration dated June 19, 1872, by *Richard Moseley* and *John Simpson*, do hereby nominate and appoint *Frederick James Clark*, Esq., of 5, *Lancaster Place, Waterloo Bridge*, W.C., to be umpire between us in and concerning the matters in difference referred to us in accordance with the terms of the above-mentioned submission.

"Witness our hands this 3rd day of July, 1872. } *James Ellis*, *William Henry Turner*."

Dr. *Ellis* and Mr. *Turner* then commenced sitting without calling in Mr. *Clark*, and they held several sittings together, and went into evidence. The matter was then adjourned, and the time for making the award enlarged to the 15th of October, 1872, and afterwards by successive adjournments to the 31st of January, 1873. The two arbitrators, being unable to agree in their view of the facts brought before them, called in Mr. *Clark* to act as umpire, and the first sitting in his presence took place on the 4th of December, 1872. It was then discovered that the proceedings had been erroneous from the beginning, and that the reference required that all the three should act together as arbitrators. Before the matter was opened Mr. *Moseley's* solicitors handed in a protest against the proceedings which had taken place. It was, however, arranged that the matter should be commenced *de novo*; and on the 9th of December, 1872, Messrs. *Simpson* and *Moseley* signed the following agreement:—"We hereby agree that no proceedings of any kind shall be taken to impugn the award to be made under this submission on any ground whatsoever." This agreement was prepared by the solicitors for *Moseley* and *Simpson*.

The sittings were continued on several days till the 16th of December, when the arbitrators closed the proceedings.

Mr. *Clark* then submitted certain questions to the other two arbitrators to be considered by them. During the month of February certain meetings took place, at which all the arbitrators were present, and there was also one meeting which Dr. *Ellis* was unable to attend.

By the 3rd of March Mr. *Clark* had obtained a draft award settled by counsel which he and Mr. *Turner* were prepared to sign, and an appointment was made to consider it; but Dr. *Ellis* was unable to attend. It was accordingly sent to him for perusal. A further meeting of all the arbitrators then took place. Dr. *Ellis* did not agree to the award, and produced a draft award which he had prepared, but to which Messrs. *Turner* and *Clark* did not assent. Their award was accordingly engrossed, and was signed by them on the 10th of March, 1873. This award was substantially in favour of Mr. *Simpson*. It gave him the business and the business premises, and ordered an assignment of them to be made to him, and directed Mr. *Moseley* to pay him £1040 11*s*. 5*d*., and also left Mr. *Moseley* liable to pay his costs in the suit and in the actions.

The award was sought to be set aside on the several grounds of partiality, corruption and misconduct, and irregularity.

The charge of partiality was based on the allegation that Mr. *Turner* was a partner with Mr. *Simpson* in a shipping business, and that Mr. *Clark* was the nominee of Mr. *Turner*. It turned out, however, that the only business connection between Mr. *Turner* and Mr. *Simpson* was, that they both held some shares in the same ship, and it was distinctly shewn that Mr. *Clark* was entirely independent, and was unknown to any of the parties previously to the arbitration, and was selected as having had great experience in arbitrations.

The charge of corruption and misconduct was the most seriously pressed. It was based on the fact that during the proceedings after Mr. *Clark* commenced sitting, which were held at the *Westminster Palace Hotel*, the parties used to adjourn between 1 and 2 P.M., and Mr. *Turner*, Mr. *Clark*, and Mr. *Simpson* and his solicitor and a shorthand writer, had lunched together at the expense of Mr. *Simpson*. Dr. *Ellis* had been invited to join the lunch party on one occasion, but had declined. He and Mr. *Moseley* had never been present on these occasions. A remark was sworn to as having been made on the return to the arbitration on one occasion by Mr. *Clark*, leading to the inference that the subject of the arbitration had been mentioned during lunch-time; but it was, on the other hand, positively sworn that the arbitration

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had not been talked about during the lunch. It was sought to be inferred that Mr. *Simpson* was actuated by corrupt motives in providing the luncheons.

The principal charge of irregularity was based first upon the fact of Mr. *Clark* being appointed umpire instead of arbitrator; and secondly, on the sittings being held in the absence of Dr. *Ellis;* and lastly, on the fact of Dr. *Ellis* not being present on one occasion when the award was considered by the other arbitrators.

A charge was also made that the case had been so conducted that Mr. *Moseley* had not sufficient opportunities for examining the books of the firm.

Mr. *Higgins*, Q.C., and Mr. *Buchanan*, in support of the motion:—

The initial irregularity is sufficient to render the award invalid. There was no appointment of a third arbitrator in accordance with the terms of the reference. Mr. *Clark* was appointed umpire, and the whole circumstances shew that he was only intended to act as umpire. In that view, the award being signed by one arbitrator and an umpire, in the absence of the other arbitrator, is necessarily bad: *Morgan* v. *Boult* (1). No subsequent waiver can cure this irregularity: *In re Haigh* (2); *In re Eastern Counties Railway Company* v. *Eastern Union Railway Company* (3).

As regards the luncheon parties, the mere fact of their having taken place in the absence of one of the parties is a sufficient ground for setting aside the award. It is almost impossible that some communication as to matters connected with the reference did not take place, and in fact it is not sworn absolutely that the subject was not mentioned. The slightest amount of communication in such a case, or even almost a shrug of the shoulders, the parties being very hostile, would be fatal: *Harvey* v. *Shelton* (4); *Dobson* v. *Groves* (5); *Re Tidswell* (6). *In re Hopper* (7) will probably be relied on by the other side, but the dinner which was objected to there did not take place till after the hearing of the

(1) 11 W. R. 265.
(2) 3 D. F. & J. 157.
(3) 3 D. J. & S. 610.
(4) 7 Beav. 455.
(5) 6 Q. B. 637.
(6) 33 Beav. 213.
(7) Law Rep. 2 Q. B. 367.

case was over, and it is clear that the Judges would have taken a very different view if the parties had not been fully heard at the time. That was, moreover, at common law, where the rules are not so strict as here. It is quite unnecessary to shew that the entertainments were given from corrupt motives, or that the arbitrators were influenced thereby. The contrary should be shewn by the other side.

It also appears that Mr. *Moseley* was not allowed proper access o the books of the partnership, and the fact of part of the discussion on the settling of the award having taken place in the absence of Dr. *Ellis*, justifies the Court in annulling it: *In re Pering and Keymer* (1).

Mr. *Glasse*, Q.C., and Mr. *Badnall*, for Mr. *Simpson* :—

There may be a waiver of objections by the conduct of the parties: *Re Salkeld and Slater* (2); *Bignall* v. *Gale* (3); *Re Tunno & Bird* (4). Here the waiver was complete, first as to the irregularity in the appointment of the third arbitrator and in the commencement of the arbitration, by beginning *de novo*, and by the agreement of the 9th of December; and all other irregularities were waived by going on with the arbitration after they were known. Independently of the question of waiver, treating an arbitrator as umpire is no ground for setting aside an award: *In re Marsh* (5). In fact, the right to a third arbitrator may be waived by treating him as an umpire: *Peterson* v. *Ayre* (6).

As to the luncheons, though the course taken may not have been the most prudent, it does not afford ground for setting aside the award. Unless corruption is distinctly made out, or it is shewn that the minds of the arbitrators were influenced by what took place, the validity of the decision cannot be questioned: *In re Hopper* (7); *Crossley* v. *Clay* (8). Here it is perfectly clear that the decision was not affected by the luncheons, and it is positively sworn that the arbitration did not form the subject of conversation during the luncheons.

(1) 3 A. & E. 245.
(2) 12 Ibid. 767.
(3) 2 Man. & G. 364.
(4) 5 B. & Ad. 488.
(5) 16 L. J. (Q.B.) 330.
(6) 14 C. B. 665.
(7) Law Rep. 2 Q. B. 367.
(8) 5 C. B. 581.

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The signature of two out of the three arbitrators is clearly sufficient: *White* v. *Sharp* (1); *Goodman* v. *Sayers* (2).

Mr. *Bagshawe* appeared for Mr. *Turner* and Mr. *Clark*, who had been served with notice of the motion, but did not ask for any costs.

Mr. *Higgins*, in reply.

SIR R. MALINS, V.C., after referring to the facts, continued:—

The result of the award is that Mr. *Moseley* is turned out upon the world without any business, and that this business has actually passed away from him. Now that appears strong, but I have no right to infer that it is necessarily improper, because I have the fact that Mr. *Simpson* has brought large sums of money into the business, and if the arbitrators, in the fair exercise of their discretion, are of opinion that the business is not enough to reimburse him for these moneys, and that he ought, under the circumstances, to have not only the business but the premises in which it is carried on, and all the other advantages which the award gives him, that is entirely within their province. The parties have selected their own judges, and nothing can be more important than that this or any Court should not lightly interfere with the discretion of arbitrators or judges selected by the parties. At the same time, it is equally important that the judges selected by the parties, who are frequently persons not skilled in the law, should be kept within the due exercise of their authority, and that the Court should exercise proper control over them, if, as Sir *William Grant* states in the case of *Goodman* v. *Sayers* (3), "there has been corruption, partiality, misconduct, or irregularity in the course of their proceedings." But if there has been neither corruption, partiality, misconduct, nor irregularity, it is not for this or any other Court to consider the conclusion to which the arbitrators have arrived.

I entirely subscribe to a passage which is to be found in the judgment of Lord Chief Justice *Cockburn* in *In re Hopper* (4), in

(1) 12 M. & W. 712.
(2) 2 Jac. & W. 249, 259.
(3) 2 Jac. & W. 259.
(4) Law Rep. 2 Q. B. 375.

which he says: "I would observe that we must not be over ready to set aside awards, where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." Now, it seems to have been the opinion of the advisers of Mr. *Moseley* that they must establish this, because the award is sought to be set aside on the ground of partiality, corruption, misconduct, and irregularity. What I have therefore to consider is whether there has been any corruption, any impartiality, any misconduct, or any irregularity on the part of the arbitrators.

[His Honour then discussed the evidence as to partiality, and stated that in his opinion the charge entirely failed. He then continued:—]

Then, as to misconduct, I am unable to find that there is any established. The charge is principally rested upon the luncheons, the facts as to which appear to be as follows: There was no doubt at that time, and there had been from 1868 downwards, a most bitter feeling of hostility between Mr. *Simpson* and Mr. *Moseley*. Of that fact Mr. *Clark*, the arbitrator, was perfectly well aware, because in his affidavit he states that their conduct was so exasperating towards each other that he told them on more than one occasion that unless they conducted the case with better temper and more discretion he should stop the arbitration altogether. Now, under those circumstances, knowing of the bitter hostility between the parties, I am bound to say, finding that it was impossible for Mr. *Simpson* and Mr. *Moseley* to sit down at the same table, I think it would have been far wiser on the part of the arbitrators, Mr. *Turner* and Mr. *Clark*, if they had made up their minds not to sit down with either of them. If they had both gone to luncheon at the same table there could have been no objection, because their conversation would have been heard, and the presence of each of them would have prevented any allusion to the arbitration, from which they had temporarily withdrawn for the purpose of refreshment; but undoubtedly, when one of them and all the parties representing him were absent, there was a possibility that a conversation relating to the subject of the arbitration might take place. Mr. *Higgins* says there might have been a shrug of the shoulder, or hints of some kind or other, which might have been

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calculated to produce an impression on the mind. By the course adopted undoubtedly the arbitrators exposed themselves to that observation and to this application to set aside the award; for I am disposed to think that if it had not been for the luncheon no application at all would have been made. But although I think it would have been wiser that none of them should have lunched with one of the parties in the absence of the others, and I regret very much that a gentleman of Mr. *Clark's* experience did not see the impropriety of this course, I think I cannot upon that ground set aside the award. I am bound to act on principle, and not on mere conjecture. I have had a great deal of difficulty on the subject, and I must confess that my first impression was, that it would be better on general principles, considering that what passed at the luncheon table might by possibility have influenced the minds of the arbitrators, to set aside the award as a lesson to all persons in future not to adopt that line of conduct. But upon carefully considering the authorities, and upon looking at all the surrounding circumstances of the case, I come to the conclusion that I should not be justified in setting aside the award upon that ground. I must not go upon possibilities. I must do what was done in *Crossley* v. *Clay* (1). The Court there says: "Nothing is alleged here to sustain the charge of misconduct. To induce the Court to interfere on such a ground there must be something more than mere suspicion." [His Honour then referred to the evidence as shewing conclusively that nothing was done or said at the luncheon in the slightest degree calculated to influence the judgment of the arbitrators, and continued:—]

But I think the case cited by Mr. *Glasse* is conclusive on the subject. Mr. *Higgins* says that the Courts of Law and Equity look on these matters in a different light, and no doubt in many cases Courts of Law and Equity do take different views; but on this question of setting aside awards I am unable to find any different view taken. I find the rule laid down by Lord *Eldon* in *Walker* v. *Frobisher* (2), which is the leading case on the subject, that where arbitrators receive evidence on one side in the absence of the other, that is always a ground for setting aside the award. That was acted upon in the case of *Dobson* v.

(1) 5 C. B. 581. (2) 6 Ves. 70.

Groves (1), where, disregarding some of the decisions of the Court of Common Pleas, the Court of Queen's Bench expressly followed the decision of Lord *Eldon*, and set aside an award where the arbitrator had received some slight evidence, after the case had closed, by one of the parties in the absence of the other. Therefore I do not find that there is any difference in the view taken on this subject by the Courts of Law and Equity.

I must say that I think in the case of *In re Hopper* (2) there were circumstances quite as strong for setting aside the award as the luncheons in the present case. [His Honour referred to the facts of that case, and continued:—]

Lord Chief Justice *Cockburn* (and the other Judges expressed themselves to the same effect), says (3): "At that dinner, so far as the umpire is concerned, there appears to have been some excess, and he is afterwards found to be intoxicated, and obliged to remain in the inn. No doubt all this was extremely improper and unbecoming. It is to be very much regretted that any one who has to exercise judicial functions should place himself in the position of appearing under an obligation to one of the parties, even in respect to hospitality, because a person who has to administer justice should be above suspicion, and therefore I cannot help regretting that that course of proceeding should have been adopted. But the question is, whether upon that ground we should set aside the award. If it could be made clear that the object of *Wrightson*, one of the parties in inviting the arbitrators and umpire to go and partake of the hospitalities at his house, had been to corrupt the umpire, or if we could see that the hospitalities thus bestowed upon the umpire had that effect, and had in any way influenced the award that he made, I quite agree that would be a very sufficient reason for setting aside this award, or at all events for refusing to enforce it summarily; but I cannot believe, looking at all the circumstances, that the object and intention of *Wrightson* was to corrupt the umpire, and I do not see the slightest reason for supposing that the umpire was in any way influenced by the hospitality he had received."

Now, adopting those expressions, I cannot come to the conclusion

(1) 6 Q. B. 637. (2) Law Rep. 2 Q. B. 367.
(3) Law Rep. 2 Q. B. 374.

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that the object of Mr. *Simpson* in giving these luncheons was to corrupt the two arbitrators. It is to the last degree improbable that he could have calculated that with two such men as a *London* merchant and one of the first auctioneers and estate agents in *London,* the gift of a luncheon could have had the least influence upon their judgment. It was, no doubt, an incautious thing, and one which I cannot approve of, but that it was not his object to corrupt them I am quite satisfied. It is clear, from their own statement in the evidence, they were not corrupted; therefore there has not been any corruption in that respect, and consequently, upon that ground, I am unable to set aside the award.

Then I think the only remaining point of the slightest importance is as to the irregularity in making the award. Now with regard to that, all the irregularities up to the appointment of Mr. *Clark* as third arbitrator are, in my opinion, conclusively waived by their going into the matter *de novo* on the 4th of December. Any irregularities up to and inclusive of the 9th of December are clearly waived by the document signed on that day, not inadvertently by the parties without legal assistance, but drawn up by their own solicitors. It is perfectly clear, upon all the cases, that any irregularity whatsoever may be waived by the parties; and so clear an evidence of a distinct agreement of waiver as this I think never occurred before.

The only irregularity after the 9th of December is that on one occasion Dr. *Ellis* did not attend a meeting of the arbitrators. But the evidence distinctly shews that he was invited to attend, and had the opportunity of attending, and it would be monstrous if, under these circumstances, the two who did attend should not be at liberty to go on with the arbitration. In this case they did go on, and I am satisfied that the award was submitted for the consideration of Dr. *Ellis,* and that he had ample opportunity of making any objection.

On all these grounds I come to the conclusion that there has been no miscarriage whatever, and that every ground upon which this award is sought to be set aside fails, and the motion must consequently be dismissed.

With regard to the arbitrators, I am very glad that Mr. *Bagshawe,* who appears for them, does not ask for costs. I am

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very much inclined to think that, on account of their conduct with reference to the luncheons, I should not have allowed them any. On the other hand, I am by no means certain that it was necessary to serve them with the motion at all. This is the first instance I have known of arbitrators being served, and I think that arbitrators whose decisions are appealed against for irregularity are not necessarily parties, any more than a Judge whose decision is appealed against, and it is possible that I might have given them costs on that ground.

Then the only remaining question is as to the costs of this motion. It has occupied a great deal of time. I should have been much more inclined to stretch a point against Mr. *Simpson* and in favour of Mr. *Moseley*, if I had been satisfied that substantial injustice had been done. But I am by no means satisfied of that. On the contrary, I have confidence in the judgment of Mr. *Clark*. He appears to have given Mr. *Moseley* every opportunity of producing evidence on his behalf, and if he failed in doing so, I am satisfied that it was his own fault. There is also much in the evidence as to partiality, for which I am satisfied that there was no foundation, and on that ground I think that the motion must be refused with costs.

Solicitors: Messrs. *Risley & Stoker;* Messrs. *Dickson & Lucas;* Messrs. *Few & Co.*

In re WYNN'S DEVISED ESTATES.

V.-C. M. 1873 *May* 26.

Sale and Exchange—Mines and Minerals—Confirmation of Sales Act (25 & 26 *Vict. c.* 108).

The Court has power under the *Confirmation* of *Sales Act* (25 & 26 Vict. c. 108) to give a general direction that persons having powers of sale and exchange in a settlement or will which do not expressly authorize the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorize such reservation or separation.

THIS was a Petition under the *Confirmation of Sales Act* (25 & 26 Vict. c. 108).

By the will of Sir *Watkin Williams Wynn* certain property was devised to certain trustees for a long term of years, and

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subject thereto by legal limitations in strict settlement, and powers of sale and exchange were given to the trustees, which did not expressly authorize the disposal of any part of the property subject to a reservation of mines or minerals or the sale of minerals apart from the land. There were, however, no words in the will restricting the mode of selling.

The Petitioners were the present trustees under the will, and the prayer of the Petition was, that they might be at liberty to exercise the powers of sale and exchange contained in the will, or either of them, so as to dispose of the lands and hereditaments for the time being subject to the uses of the will, and not comprised in certain indentures therein mentioned, or any of such lands and hereditaments, by way of sale or exchange, with an exception or reservation of any mines or minerals in or under the said lands and hereditaments respectively, and with or without rights and powers of or incidental to the working, getting, or carrying away of such mines or minerals respectively, and so also as to dispose of any of the said lands and hereditaments respectively, with or without such rights or powers as aforesaid, and separately from the said lands and hereditaments in or under which such mines or minerals respectively are, and in either case without prejudice to any future exercise of the powers aforesaid, or either of them, with respect to the excepted mines or minerals, or as the case might be, the undisposed of lands and hereditaments aforesaid.

Mr. *Edward Harrison*, for the Petitioners:—

An order similar to that now asked for appears to have been made in *In re Brown's Trust Estate* (1). Service on the beneficiaries is not required in an application of this kind: *In re Pryse's Estates* (2).

Sir R. Malins, V.C.:—

There seems no objection to making the order asked for; because powers of sale or exchange ought to be so framed as to empower a disposal of minerals apart from the land.

Solicitors: Messrs. *Dean & Taylor.*

(1) 11 W. R. 19. (2) Law Rep. 10 Eq. 531.

In re BROWN'S TRUST.

V.-C. M.
1873
May 30.

Bequest—Illegitimate Child—"Leaving" construed to mean "having."

A testator gave a fund to trustees to pay the dividends to his daughter for life, and after her decease to transfer the principal equally amongst all the children of his said daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their executors, administrators, and assigns. But in case his daughter should die "leaving" no issue, then to the testator's other children.

Long before the date of the will the testator's daughter was, with the testator's knowledge, living with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. The daughter being sixty-seven years of age, and having had no other child, and her husband being dead:—

Held, that the illegitimate son was entitled absolutely to the capital, and the word "leaving" being construed "having," and he being now over twenty-one, the money was ordered to be paid to the mother and son, who petitioned for payment to them jointly.

A TESTATOR gave all his personal estate and effects to trustees upon trust to sell and invest, and stand possessed of the proceeds upon trust to pay the dividends thereof to his daughter for her separate use for life, and after her decease upon trust to pay, assign, and transfer the principal sum of £2500 or the stocks, funds, or securities upon which the same might be invested, equally amongst all the children of his said daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain the age of twenty-one years, their respective executors, administrators, and assigns. But in case his said daughter should die leaving no issue, either by her said putative husband or by any other person, who should attain the age of twenty-one years, then the testator declared that the said sum of £2500 should be paid and divided equally amongst all his other children who should be living at the time of his said daughter's decease and failure of issue as aforesaid, and the issue of such of his children as should be then dead, leaving issue; and after other dispositions the testator bequeathed the residue of his personal estate and effects unto the Respondent *Robert Brown*, his executors, administrators, and assigns.

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For several years prior to and at the date of the will the daughter of the testator, with his knowledge, had been living with the gentleman to whom she was subsequently married, as his reputed wife, and at the date of the will she had one son, then four years of age, whom she had borne to the said gentleman, who was by the testator believed to be illegitimate, and of whom the said gentleman was, by the testator, believed to be and acknowledged as the natural father.

The son was born in February, 1831. His mother was married after the date of the will to his father, who died some years since, and there was no issue of the marriage, and she had not married again and had had no other issue. She was now sixty-seven years of age.

The two Petitioners, the mother and son, applied to the trustees to have the money paid to them, but the trustees paid the money into Court, and this Petition prayed that the said sum so paid into Court might be transferred to the Petitioners.

Mr. *Glasse*, Q.C., and Mr. *Haughton*, for the Petitioners:—

No one can doubt what the intention of this testator was. He knew that his daughter was living with a gentleman to whom she could not at that time be legally married, as his wife was then living, therefore he calls the gentleman her putative husband. He also knew that a son had been born, who was four years old at the date of the will, and he recognised that son as his grandchild, therefore he gave the property equally amongst all the children of his daughter, whether by her present putative husband or by any other person whom she might marry, who should attain twenty-one. The case is concluded by the decision in *Crook* v. *Hill* (1), in which all the authorities were cited; there the testator's daughter could never become the wife of the person with whom she was living. Here, on the contrary, she was waiting till the time when a valid marriage could be effected, which did in fact take place afterwards.

Another question is raised as to whether the son took a vested interest. That question is settled by *Ex parte Hooper* (2) and *White* v. *Hill* (3), where "leaving" issue was construed to mean

(1) Law Rep. 6 Ch. 311. (2) 1 Drew. 264.
(3) Law Rep. 4 Eq. 265.

"having." There has been only one son of the marriage, and the mother has never been again married, consequently the son is absolutely entitled upon the death of his mother, and as they both petition for the payment out to them, they are entitled to what they ask.

Mr. *Cotton*, Q.C., and Mr. *Vaughan Hawkins*, for the Respondent:—

The rule is that legitimate children only are entitled to take under the word "children"; and this rule is never departed from if the terms of the will can be satisfied by that construction being adopted. In this case the testator, no doubt, was aware that his daughter was living with a particular person, and he knew that she might and probably would be married to him at some future time, therefore he includes such children as his daughter might have by him; but this description can be satisfied by construing the words to mean children she may have by him after their marriage. There were no children born after the marriage took place, consequently the person designated to take on failure of children by the daughter is now entitled to the fund. But if the Court should decide otherwise, then we contend that the son can only be entitled in case he is alive at the death of his mother, and therefore that the money cannot be paid out of Court to the two Petitioners jointly.

SIR R. MALINS, V.C.:—

Where there is a gift to children the general rule is that none but legitimate children take, whether they are the children of the testator or of any other person; but this rule is subject to many exceptions, and where it can be collected that the testator must have intended illegitimate children to take, the Court will allow that construction to take effect.

This principle was acted upon in *Sherratt* v. *Bentley* (1), where it was held that if the general intention of a testator can be collected from the whole will, particular terms used which are inconsistent with the intention may be regarded as introduced by the testator's mistake, or ignorance of the force of the words he has used.

(1) 2 My. & K. 149.

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Crook v. *Hill* (1) is an authority in support of this view. In that case there was a gift to the testator's daughter *Mary*, the wife of *J. C.*, for life, independent of her present or any after taken husband, and after her death to such of her children as she should appoint. *Mary* was not the wife of *J. C.*, although she had gone through the ceremony of marriage with him, and as *J. C.* was her deceased sister's husband, she could not become his wife so as to answer the terms of the will, but yet as by the will the testator shewed that he intended to recognise the children as legitimate, it was held that illegitimate children took as well as lawful children of the testator's daughter. That case has been recently affirmed by the House of Lords.

Here the question is peculiar, the testator's daughter, with the full knowledge of the testator, was living with a gentleman to whom she was afterwards married. At the date of the will she had a son four years old, and the testator had recognised the child as his grandson; and knowing these facts, he makes his will in these words: After the death of his daughter to assign and transfer the capital "equally amongst all the children of my said daughter, whether by her present putative husband or by any other person whom she may marry, who shall attain twenty-one." At that time there was an impediment to her marrying.

It is said that the testator meant the children his daughter might have by the gentleman she was living with in case she became his wife, but that would, I think, be stretching the words further than could have been within the intention of the testator, though no doubt the testator meant to include also any children his daughter might have in case she married that gentleman whom he calls her putative husband; but in fact there were none. So that question does not arise. My opinion is, that any illegitimate children she might have by him are distinctly designated to take equally with any legitimate children she might have either by him or any other husband.

It appears that there has been but one son, and the mother is now sixty-seven years of age, consequently the mother and son are entitled. I do not think there can be any doubt as to the other point raised, whether the son took an absolute interest under the

(1) Law Rep. 6 Ch. 311.

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will. The words are, "But in case my said daughter shall die leaving no issue either by her said putative husband, or by any other person who should attain the age of twenty-one years." The object of the law is to vest property as early as possible, and not to delay the vesting. The case of *White* v. *Hill* (1) decided that dying "without leaving any child or children," must be construed without "having" any child or children, and that the property vested in a child notwithstanding the child might die before the tenant for life. On that case, therefore, as well as many other authorities of the same description, I hold that the children would take vested interests; and there being but one son and he having attained twenty-one, and the mother being now sixty-seven years of age, the mother and son are consequently entitled to the money and the order may be made as prayed by the Petition.

12 L.D. 752

Solicitors for the Petitioners: Messrs. *Lee, Pemberton, & Reeves.*

Solicitors for the Respondents: Mr. *R. H. Nettleship;* Messrs. *Williamson, Hill, & Co.*

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V.-C. M. 1873 *June* 2.

County Court Appeal—Jurisdiction in Bankruptcy—Costs—32 & 33 *Vict. c.* 71.

After proceedings had been instituted in a County Court for winding up a debtor's affairs in liquidation:—

Held, that an application relating to costs claimed under a deed of assignment executed by the creditor should have been made by proceedings in bankruptcy, not by plaint in equity.

2 L.D. 551.

THIS was an appeal from the decision of the Judge of the County Court of *Monmouthshire* holden at *Newport.*

The plaint was filed on the 13th of September, 1872, stating that the Plaintiff in the month of March, 1872, filed in the said County Court, as solicitor for *F. K. Andrews,* a petition for liquidation by arrangement or composition with his creditors pursuant to the provisions of the *Bankruptcy Act,* 1869, and that on the 14th of March, 1872, a receiver was appointed. That on the 27th of the same month the first meeting of creditors under the

(1) Law Rep. 4 Eq. 265.

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petition was held at the Plaintiff's office, and resolutions were then duly passed by them to accept a composition of 6*s.* 8*d.* in the pound, payable by three instalments, in satisfaction of the debts due to the creditors, and appointing the receiver trustee. That on the 9th of April, 1872, a second meeting of creditors under the petition was held at the Plaintiff's office, and the resolutions passed at the first meeting were confirmed, and an additional resolution was passed that the composition should be secured by the note of hand of the debtor, and an assignment of the whole of his stock in trade, book debts, and other effects to the Defendants as trustees for his creditors for payment of the said composition. That the Plaintiff prepared a deed of assignment to them, which bore date the 22nd day of June, 1872, and was executed by *F. K. Andrews*, whereby he assigned all his stock-in-trade, book debts, and other effects to the Defendants upon trust if he failed to pay the composition then to realize the effects, and in the first place pay the expenses incurred in or about the sale or sales thereof, or otherwise in relation to the security; and in the next place apply such moneys in discharge of all the costs incurred by and incident to the proceedings instituted by *F. K. Andrews* for liquidation by arrangement or composition with his creditors, and upon full payment thereof to pay to his creditors who should then have proved their debts a sum equal to 6*s.* 8*d.* in the pound, and to hold the surplus, if any, in trust for the debtor. That the Plaintiff's costs and charges in connection with the proceedings for liquidation by arrangement or composition, and in connection with the indenture of assignment, had been taxed and allowed by the Registrar of the said Court at the sum of £43 16*s.* 2*d.*, and a copy of his allocatur thereon had been served on the Defendants. That the debtor failed to pay the first dividend on the composition, and the Defendants acted under the indenture of assignment and sold and converted into money all the stock in trade and other effects of the debtor, and received and were now in possession of the proceeds thereof, and neglected and refused to pay the Plaintiff his costs or any part thereof. The Plaintiff prayed that the Court would declare and enforce the trusts of the indenture of assignment, and order payment by the Defendants to the Plaintiff of the moneys, or so much thereof as should be sufficient to

cover his claim, and to pay the costs of the suit; and for further relief.

The case stated that the debtor had refused to execute the bill of sale, and thereupon the Appellant applied to the County Court, sitting in Bankruptcy, on behalf of the trustees, for an order compelling him to execute the same, and the Court made the order on the *ex parte* application of the Appellant without having had its attention called to the variance between the trusts of the deed and the resolution at the last meeting, that is to say, in that the resolution made no provision for the costs due to the Appellant, whilst the trusts of the deed secured to him the payment of all his costs before satisfying the composition to be paid to the creditors.

At the hearing of the plaint, the resolutions of the meeting of the 27th of March and the 9th of April, the bill of sale, and the order of the Court sitting in Bankruptcy, were read, and several witnesses were examined *vivâ voce* as to what had taken place at the last meeting of creditors with reference to the Appellant's costs. After hearing such evidence, and having regard to the terms of the resolution which had been prepared by the Appellant himself, the Judge was of opinion and found as a fact that the Appellant had consented to postpone his claim for all costs due to him from the debtor, to the right of the creditors to enforce the payment of their composition against the debtor's estate; and that the property included in the bill of sale should, in case of non-payment of the debtor's promissory notes, be applied, in the first place, to the payment of their said composition.

It was also proved that the attention of the trustees had never been called to the trust for the payment of the Appellant's costs until after they had converted the debtor's property by sale, when the Appellant applied to them for payment of his bill of costs out of the proceeds of the sale.

Upon this state of facts the Judge held that the Appellant was not entitled to have the costs due to him from the debtor paid out of the proceeds of the sale, but only the costs incurred from the time that he had been instructed to move the Court sitting in Bankruptcy to compel the said debtor to execute the said deed; and an order was thereupon made, bearing date the 22nd day

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of October, 1872, by which it was declared "that the trustees held the said fund or proceeds of sale in trust to pay all costs incurred since and including the said motion to compel the debtor to execute the said deed;" but the learned Judge refused to make any declaration as to the Plaintiff's costs prior to the said motion, and the Defendants refused to pay the Plaintiff his said prior costs or any part thereof.

The Judge made no order as to costs of plaint.

The questions for the opinion of the Vice-Chancellor were :—

1. Whether the Judge ought to have omitted to declare that the Defendants held the said trust fund or proceeds in trust in the first place to pay all costs, charges, and expenses incurred in or about the proceedings for liquidation by arrangement prior to, as well as of and subsequent to the said motion?

2. Whether the said order of the 22nd of October was erroneous and ought to be varied?

3. Whether the Judge ought to have dismissed the plaint on the ground that the subject matter thereof was properly cognizable by the County Court in Bankruptcy, and that the County Court sitting in Bankruptcy had ampler powers for dealing with all the equities of this case than were committed to the County Court under the *County Courts Equitable Jurisdiction Act*?

It was further shewn upon the evidence that the Plaintiff had applied to the County Court Judge sitting in Bankruptcy to order the Defendants to pay the Plaintiff his taxed costs in pursuance of the trusts of the assignment, but the Judge, on the 24th of August, 1872, refused to make such order, considering that he had no power to do more than enforce the arrangement resolved on by the creditors, and that as far as the deed of assignment had exceeded or not conformed to those resolutions it must be disregarded.

It was also proved that the property realized upon sale only £39.

Mr. *Glasse*, Q.C., and Mr. *Villiers*, in support of the appeal :—

The County Court Judge has miscarried in his decision in this case. The resolutions passed by the creditors made no mention of the costs incurred by the Plaintiff, but by the trusts of the deed of

assignment, which was prepared by the Plaintiff, the Defendants were in the first instance to pay out of the proceeds of the sale of the property all costs incurred by the Plaintiff in connection with the proceedings upon the composition, as well as the costs of preparing the assignment. It is not the practice in framing resolutions for effecting compositions with creditors to provide for payment of costs, but a trust for that purpose is always inserted in the deed of assignment. The deed is an advantage to the creditors, because it enables them upon non-payment of the first instalment of the composition to realize the debtor's estate, which they could not otherwise do; and it is unreasonable that the creditors should realize the whole of the debtor's estate and not pay the costs of and incidental to the proceedings. The debtor, after parting with all his property, ought not to be left liable to pay the costs incurred in realizing the property without anything left to pay them with.

It was held in *Strick* v. *De Mattos* (1) that it was reasonable that a deed of inspectorship under the *Bankruptcy Act* of 1861 should contain a provision for payment of the costs incurred relating to the proceedings connected with the suspension of payment by the debtor; and *Spitzer* v. *Chaffers* (2) decided that an arrangement under the *Bankrupt Law Amendment Act* of 1849 (12 & 13 Vict. c. 106) was not avoided by a provision enabling the trustees to pay all costs and expenses which they might be put to in connection with the deed for carrying out the arrangement. These cases shew that the payment of costs is a usual provision in deeds of arrangement. The trustees have acted in the trusts of the deed, and are therefore bound to apply the proceeds of sale according to those trusts, the first of which is to pay the costs of the Plaintiff. The instructions to prepare the deed were given to the Plaintiff by the trustees and not by the debtor, and under any circumstances they should pay that portion of the costs, and as they refused to pay any of these costs before the suit was commenced, and as the Judge decided that some portion of the costs, namely, those connected with the application to the Court in Bankruptcy, should be paid, he ought also to have ordered payment to him of the costs of suit.

(1) 3 H. & C. 22. (2) 14 C. B. (N.S.) 686.

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Then as to the jurisdiction in Bankruptcy, which is the third question raised, it must be borne in mind that a motion was made to the County Court sitting in Bankruptcy to order the Defendants, the trustees, to pay the moneys in their hands, or so much thereof as would satisfy the Plaintiff's taxed costs, in pursuance of the trusts of the assignment, when the same was refused by the Judge, principally on the ground that the creditors having resolved upon a composition the matter was not then in Bankruptcy.

Mr. *Cotton*, Q.C., and Mr. *Millar*, for the Defendants:—

When the meeting of creditors took place in March, 1872, it was resolved by the creditors that a composition of an ascertained amount should be accepted in lieu of a liquidation, which would have given them a chance of receiving a larger or smaller dividend out of the estate; but this mode of liquidating is always subject to the debtor making his own arrangement for payment of his own costs. It is not an assignment of all the debtor's estate, leaving him denuded of everything, but only a mortgage under which, after a certain dividend upon debts has been paid, the property reverts to the debtor or mortgagor. At the second meeting of the creditors this composition was secured by the debtor's note of hand and the assignment of his estate. These two resolutions formed the "extraordinary resolution" mentioned in the 126th section of the *Bankruptcy Act*, 1869, and was subject, upon registration, to be enforced by the Court.

The deed of assignment was prepared by the Plaintiff himself, and was executed only by the debtor, and the trustees were unaware of the trusts contained therein as to payment of the costs until after the sale of the estate. As the property, in fact, only realized £39, from which the costs of sale would have to be deducted, the Plaintiff's costs would be more than the property realized. Under these circumstances, the trustees refused to pay the costs until the composition was first provided for.

The Plaintiff has already applied to the County Court Judge in Bankruptcy for an order on the trustees to pay him his costs; but the Judge, on the 24th of August, 1872, held that he had no power to do more than enforce the arrangement resolved on by the creditors, and dismissed the application. The Plaintiff then

filed this plaint in Equity, in order to obtain what the Judge thought he had no power to grant in Bankruptcy.

The County Court Judge has found upon the facts that the Plaintiff consented to postpone his claim for costs to the composition, and this finding ought to be conclusive, since there can be no appeal upon the facts. But upon the law of the matter it is clear that there is a material difference between liquidation and composition. In liquidation a debtor gives up everything, and his whole property vests in a trustee, to be administered as in bankruptcy—that is, costs and preferential claims first, and the creditors take the rest; whereas in composition there is no *cessio bonorum* or vesting of title in a trustee, unless expressly resolved on, and the debtor makes a positive offer to his creditors, taking care to make a sufficient reserve to pay costs.

In the case of *Ex parte Birmingham Gas Light and Coke Company* (1), the Chief Judge in Bankruptcy expressly says: "The property of the debtor is not taken from him, nor vested in a trustee; it is not 'distributed in the same manner as in bankruptcy.' On the contrary, the debtor is left in the possession of his assets, for the very purpose, it may be, of enabling him to fulfil the engagement he has entered into with his creditors to pay them the stipulated composition."

This assignment deed was not prepared in conformity with the resolution of the creditors. *Wilson* v. *Lloyd* (2) is an authority shewing that a deed of composition must be drawn in strict conformity with the resolutions passed at the meeting of creditors. In that case, an attempt to introduce into the deed a reservation of rights against sureties which was not included in the resolutions of the creditors failed. It is true that in *Jacobson* v. *Lamert* (3), it was held that a clause in a deed of assignment, under the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), charging the debtor's property primarily with the expense of obtaining the creditor's assent to the deed, was reasonable; but that was a deed under sect. 192, whereby the debtor had denuded himself of all his property, and, therefore, it was just that all the costs should be paid by those to whom the property was conveyed.

(1) Law Rep. 11 Eq. 204, 207. (2) 28 L. T. (N.S.) 331.
(3) Law Rep. 2 Ex. 394.

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This deed is in the nature of a mortgage to secure the payment of 6*s.* 8*d.* in the pound, and until default is made in payment of that sum, the property remains in possession of the debtor. All the costs incurred by the debtor are incident to the arrangement.

Then as regards jurisdiction, we contend that the question ought to have been decided by the County Court Judge sitting in Bankruptcy. From that decision there could have been an appeal to the Chief Judge in Bankruptcy, and the Plaintiff had no right to file a plaint in equity for the decision of a point arising under the jurisdiction in Bankruptcy. This Court has always refused to interfere with the jurisdiction in Bankruptcy; that has been decided in many cases, the principal of which are, *Martin* v. *Powning* (1); *Stone* v. *Thomas* (2); *Phillips* v. *Furber* (3); *Ex parte Rumboll* (4); and *Morley* v. *White* (5).

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

It is agreed on all sides that there were proceedings taken in Bankruptcy in this case which gave the County Court Judge jurisdiction in all questions under the bankruptcy. It is also agreed that the question falls within the 72nd section of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), which provides that every Court having jurisdiction in Bankruptcy under the Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case. The County Court therefore had complete jurisdiction to deal with this case in Bankruptcy.

The 125th section of the Act provides for a case of liquidation in which the debtor gives up all his property to be held by a trustee to divide among his creditors until they are paid; but

(1) Law Rep. 4 Ch. 356.
(2) Ibid. 5 Ch. 219.
(3) Law Rep. 5 Ch. 746.
(4) Ibid. 6 Ch. 842.
(5) Law Rep. 8 Ch. 214.

this is a case falling within the 126th section, by which the creditors of a debtor may without any proceedings in bankruptcy by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. In cases where the whole property is given up it is obvious that justice requires that all the costs should be paid whether they are costs of solicitors or other costs incurred in effecting the arrangement, as there would be no other means of payment when the debtor has given up everything; but where the case falls within the 126th section a very different principle applies, because then all the property of the debtor is preserved to him after he has paid the composition agreed upon. In such cases it is not necessary to reserve any sum for payment of the costs incurred in effecting the composition. What, then, was the duty of the County Court Judge? It is quite clear that the Court of Bankruptcy was the proper jurisdiction to decide any questions arising under the composition, and the County Court Judge sitting in Bankruptcy is the person to decide what costs ought to be paid, and from his decision there would be a appeal to the Chief Judge in Bankruptcy. All that is complained of is, that he ought to have allowed certain costs which he refused.

Now, this case raises an important question, whether a solicitor or any other person who has his costs refused in the administration in Bankruptcy is at liberty to file a bill in Chancery to obtain payment of those costs, for this is the same to all intents and purposes as a bill in Chancery. It would be the same thing if any solicitor were refused his costs by the Chief Judge in Bankruptcy, and were then to file a bill in Chancery to reverse the decision of the Chief Judge. Has any one ever heard of such a bill being filed? To say that a bill may be filed in such a case for payment of a bill of costs is quite contrary to the rules of this Court.

There appears to be some doubt whether when the application was made by the Plaintiff to the Judge in Bankruptcy as to compelling the debtor to sign the notes, his attention was called to the question of costs. If he had made any order under his jurisdiction in Bankruptcy, that might have been appealed to the Chief Judge.

Then there is the question whether these costs are payable by

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the debtor or not. If they are, then the Judge has found as a fact that the Plaintiff consented to postpone them to the composition payable to the creditors, and as an appeal from the County Court can only lie upon a question of law or equity, and not upon a question of fact, it would not be within my jurisdiction to decide the matter. It seems clear that if the composition is to be postponed to the payment of costs, there will be nothing left for the creditors. If these costs are refused by the trustees, then the course is not to appeal under this application, but to the Judge in Bankruptcy.

It has been argued that this Court will not interfere in questions arising in Bankruptcy unless extraordinary reason for doing so is shewn, and the cases of *Martin* v. *Powning* (1); *Stone* v. *Thomas* (2); *Phillips* v. *Furber* (3); *Ex parte Rumboll* (4); and *Morley* v. *White* (5), have been cited in support of that contention. Why the parties should file a bill in Chancery for payment of these costs I do not know, my opinion is that they have no right to do so. It is the same principle as I acted upon in the case of *Berkeley* v. *Dicker*, which came before me on the 31st of May, 1867, where, upon a motion for an injunction to restrain the Defendant from proceeding to enforce payment of a judgment debt otherwise than in accordance with the provisions of a deed of composition entered into by the Plaintiff with his creditors, I refused to interfere with the proceedings in Bankruptcy.

I can find no reason why these questions should be transferred from the jurisdiction in Bankruptcy to this Court. Therefore, whether the decision of the Judge of the County Court is right or wrong as to the refusal to allow costs, I think the plaint was wholly unsustainable, and ought not to have been filed. The appeal must therefore be dismissed with costs.

Solicitor for the Appellant: Mr. *Raw.*

Solicitors for the Defendants: Messrs. *Jones, Blaxland, & Son.*

(1) Law Rep. 4 Ch. 356.
(2) Ibid. 5 Ch. 219.
(3) Law Rep. 5 Ch. 746.
(4) Ibid. 6 Ch. 842.
(5) Law Rep. 8 Ch. 214.

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[1872 C. 18.]

Bona Vacantia—Chief Clerk of the Queen's Bench—Abolition of Office—Interest of Suitors' Deposits—1 Vict. c. 30.

The late Lord *Ellenborough* held the office of Chief Clerk of the Court of Queen's Bench from 1811 till 1838, when the office was abolished by the statute 1 Vict. c. 30. During that time he received the suitors' funds paid into Court and invested them in exchequer bills, and received the interest for his own benefit, but from the date of a report of a select committee of the House of Commons in 1834, Lord *Ellenborough*, in deference to the report, left the accumulations of interest standing to a separate account at his bankers. He died in 1871:—

Held, in a suit to administer his estate, that the executors were not entitled to the accumulated fund, and that it belonged to the Crown.

THIS suit was instituted by Lord *Colchester* and Sir *Robert Dallas*, the executors of the will of the late Earl of *Ellenborough*, who died in December, 1871, for the administration of the testator's estate; and the case now came on upon adjourned summons upon an application by the executors that they might be at liberty to apply for payment of, and receive from Messrs. *Hoare & Co.*, bankers, all exchequer bills, cash, or other moneys or securities for money now in the hands of the said bankers, to the account of "The Chief Clerk's Guarantee Fund," as being part of the personal estate of the late Earl of *Ellenborough*, now outstanding or undisposed of, and that the applicants might be at liberty to apply the same, when received, as directed by the will of the said testator with regard to his personal estate not specifically bequeathed, and that the costs of this application might be costs in the cause.

The facts were as follows:—

The testator, in Michaelmas Term, 1811, was appointed to the office of Chief Clerk of the Court of King's Bench, and held such appointment until the abolishment thereof on the 1st of January, 1838. When first appointed to the office the testator found a sum of £5000 invested in exchequer bills, which were deposited with Messrs. *Hoare*, who banked for him in respect of all suitors'

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moneys from time to time in his hands. The testator's father, the Lord Chief Justice, directed that the income arising from these sums should be carried to the testator's private account, and the testator always received the dividends and interest accruing therefrom up to the 25th of July, 1834, when a report was published by a select committee of the House of Commons on the subject of sinecure offices, and in deference to, but not as being bound by, the opinion expressed by the committee, the testator refrained from receiving any further dividends.

By the Act of 1 Vict. c. 30, which was passed in pursuance of the said report of the select committee, the office of Chief Clerk of the Court of Queen's Bench was abolished, and under the provisions of that Act the testator paid over to the Master of the Court of Queen's Bench appointed by that Act to receive the same, the balance of suitors' money remaining in his hands, and rendered an account thereof, but he neither paid over nor in any way accounted for the interest which had accumulated on the said £5000 exchequer bills as from the date of the report, and such interest he allowed to remain at the bank of Messrs. *Hoare,* partly invested in exchequer bills and partly in cash, up to the time of his death; and with regard thereto the testator left the following memorandum addressed to his executors:—

"My executors will find a few exchequer bills and a small balance at Messrs. *Hoare's,* under the head of 'Chief Clerk's Guarantee Fund,' the whole not amounting to much more than £700. The origin of the sum is this: a committee of the House of Commons came to an opinion that the Chief Clerk should not derive any advantage from the interest of the £5000 exchequer bills, in which a portion of the balance of the suitors' money in his custody was invested; and from that time I have not derived any advantage from it. But what was I to do with the interest? If I sold the exchequer bills, and left the money produced by them at Messrs. *Hoare's,* of course they would have re-invested the money, and had the advantage of which I was deprived; but the security of the suitor to whom the money belonged was better while it was in exchequer bills, held in the Chief Clerk's name, than when those exchequer bills were held by the bankers. The public had nothing to do with the money;

it was the money of the suitors, temporarily deposited with the Chief Clerk as the banker of the Court, and he had always dealt with it as any other banker would. Mr. *Way*, the Chief Clerk who preceded me, had invested £10,000 of the balance at Messrs. *Hoare's* in exchequer bills. When the office fell under my father's management he directed £5000 exchequer bills to be sold, and the money produced by the sale was added to the balance in Messrs. *Hoare's* hands, because, my father not banking with them, they ought, he thought, to have ample profit upon the business they transacted for him. I thus have done what the committee of the House of Commons decided, in deriving no profit from the custody of the suitors' money; but my executors must consider what shall be done with it. I did not pay it over to any one when I paid over the suitors' money on the abolition of my office of Chief Clerk, because the suitor had no claim upon it. He is entitled to have out the exact sum he paid in. The balance at Messrs. *Hoare's* really belongs to no one if not to me. I have not used it, out of deference to the opinion expressed by the committee of the House of Commons."

These sums, with the accumulations, now amounted to about £1100, and the executors asked that they might be allowed to appropriate them as part of the testator's personal property as above stated.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the executors of the will:—

When this money was paid into the Court of Queen's Bench by the suitors, it remained there to answer the orders made for payment out; but the suitors were not entitled to interest upon these sums, neither were the public entitled to such interest. The money was paid to the officer of the Court, and it was safer for him to invest the amount in exchequer bills or other sufficient securities than to have it deposited in a banker's hands. What, then, could be done with the interest which would necessarily arise from these investments? We submit that they were part of the perquisites of the office, and formed an indemnity to the Chief Clerk for his trouble and responsibility, and a guarantee for the return of the amount paid in when required. After the report of the

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select committee of the House of Commons in 1834 an alteration was effected with regard to these payments, and an Act was passed making new arrangements; but the committee did not decide, and could not decide, that the previous interest was to be paid by Lord *Ellenborough* for public purposes; therefore up to the date of the Act there was nothing which affected the right of the Chief Clerk to receive these moneys.

Mr. *Cotton*, Q.C., and Mr. *Owen*, for the residuary legatees under the will.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, for the Crown:—

This case is precisely analogous to that which has occurred on a much larger scale in the Court of Chancery. The funds there accumulated by way of banking profit on the moneys of suitors have been dealt with by successive Acts of Parliament for various purposes, and it has been assumed that the suitors acquired no title to the interest made out of their deposits except as a security for repayment of the principal sums paid in. There would be an utter impossibility of apportioning the suitors' rights (if they had any) to the banking profit, or even ascertaining what suitors were entitled. For all practical purposes the profits so accumulated have been treated as public moneys, while the rights of the suitors to their principal moneys have been fully acknowledged, even to the extent of treating the aggregate amount invested as a security for each particular suitor who has paid in money, without regard to the time or amount of such payment. This seems to have been the view adopted by the Legislature, and it excludes any claim by suitors in the King's Bench to the banking profits in question, except by way of security in case the amounts held as principal should be deficient to answer the sums paid in. If the suitors have no claim, it is abundantly clear that no one else has. The Chief Clerk never was in the position of a banker, but in that of a trustee; and the beneficial interest belongs to the public. Upon principle, therefore, it seems clear that the Crown is entitled to claim this fund as *bona vacantia*.

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In my opinion this money, being the accumulated interest upon the funds received by Lord *Ellenborough* in his capacity of Chief Clerk to the Court of Queen's Bench, belongs to the Crown for the benefit of the public. The order will therefore be that it be handed over to the Paymaster-General.

Solicitors for the Plaintiffs: Messrs. *Collyer-Bristow & Co.*
Solicitors for the Crown: Messrs. *Raven & Bradley.*

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May 23, 27; *June* 3.

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[1855 C. 117.]

Will — Construction — Preferential Trusts — Rule against Multiplication of Charges—Double Portions—Ademption—Provision for Daughter—Payment to Husband of Daughter—Gift over, on failure of Issue of Child, to other Children then living—Stirpital Construction—"Child then living" held to mean "Child who or whose Issue should be then living."

A testator by his will made a series of specific devises upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; and he then gave his residuary real and personal estate upon and for the trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised:—

Held, that each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically devised estate and the child's share of residue.

Secus, if the power had been to appoint an annuity of or not exceeding a fixed amount.

A testator by his will, after directing his debts to be paid, gave a share of his residuary estate upon trust for one of his daughters for life, with remainder to her children as tenants in common, with remainders over in favour of the other children of the testator. Subsequently to the date of the will the daughter married, and upon the occasion of the marriage a settlement was executed to which the testator was a party, by which, after a recital of an agreement by the testator to give his daughter a portion of £5000, whereof £1000 was to be paid to the husband and £4000 to be a provision for the daughter, her husband, and their issue, the testator covenanted to pay £4000 to the trustees in his lifetime, or within two years after his death, to be held upon trusts for the benefit of the husband and wife and their children, and in case of there being no issue of the marriage who should attain twenty-one as the testator should appoint, and in default of appointment for his next of kin. The sum of £1000 was paid to the husband, who died leaving his wife surviving him. No child of the marriage lived to take a vested interest under the settlement:—

Held, that the gift of residue in favour of the daughter was adeemed to the extent of the £4000 covenanted to be paid by the testator; but that there was no ademption as to the £1000 given to the husband absolutely.

The testator made a series of specific devises upon trust for each of his children for life, with remainder to the children of such tenant for life as tenants in common in tail, with cross remainders between them, and failing such issue of the tenant for life, in trust for the testator's other children

equally, and the heirs of their respective bodies, as tenants in common, or if there should be only one of his said children "then living," in trust for that child, and the heirs of his or her body; he afterwards gave a share of his residuary real and personal estate upon such trusts as should correspond with those declared concerning his specifically devised estate, which gift was followed by a provision for the event of any child dying in the testator's lifetime, leaving children:—

Held, that the gift over, on failure of the issue of a tenant for life, was in favour of children who, or whose issue, were living at the time when the gift over took effect.

THIS was a suit for the administration of the estate and execution of the trusts of the will of *William Macdonald* (formerly of *Darlinghurst*, in the colony of *New South Wales*, but, at the time of making his will, of *Birmingham*), who by his will, dated the 5th of December, 1846, after making certain specific bequests, devised all his real and personal estate (except that part of the personal estate which he had specifically bequeathed) to trustees, "upon and for the trusts and purposes, and with, under, and subject to the powers, provisoes, conditions, and limitations hereinafter expressed (that is to say): First, as to all those three of my dwelling-houses situate in *George Street*, in the town of *Sydney*, in the said colony, at a place called *Macdonald's Buildings*" [describing them] "in trust for my daughter *Angelina* during her life, and immediately after her decease in trust for her children equally and the heirs of their respective bodies as tenants in common, or if she have only one child, then in trust for such only child and the heirs of his or her body, with trust limitations in the nature of cross remainders between such children as to both original and accruing shares, and failing such issue of my said daughter *Angelina*, in trust for my other children equally, and the heirs of their respective bodies as tenants in common, or if there be only one of my said children then living, in trust for that child only and the heirs of his or her body, with trust limitations in the nature of cross remainders between such children as to both original and accruing shares, and, failing all such issue, then upon the trusts hereinafter declared." The testator then directed other specific portions of his real estate to be held on exactly similar trusts for each of his other children, the last of such gifts being in favour of his son *Edward William*. The will then proceeded as follows:—

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"Provided always, and I hereby declare it to be my will, that in the event of the property hereinbefore specifically devised for the benefit of my said son *Edward William* not being at my decease, in the opinion of my trustees, upon a fair valuation being taken by them, equal in value to the average value of the estates hereinbefore specifically devised for the benefit of my other children, then my trustees shall, within one year after my decease, set apart and allot some other portion of my real estate situated in this colony, not hereinbefore devised, so as to make the share of my said son *Edward William* equal in value to the average value of the estates hereinbefore devised for the benefit of my other children, and such additional portion, if any, shall be held by my trustees upon and for the same trusts and purposes, and with and subject to the same powers, limitations, and conditions in every respect, as the other property hereinbefore devised for the benefit of my said son *Edward William*."

The testator then declared that all the trusts so declared in favour of his said children should be respectively subject to the powers, limitations, provisoes, and conditions thereinafter mentioned, one of which powers was in the following terms: "I empower every tenant for life, under the limitations in this my will contained, either in contemplation of marriage or after marriage, to limit or appoint by will to, or in favour of, every or any person he or she shall marry or have married, a yearly rent-charge not exceeding in the whole one-third part of the clear net yearly income of the said hereditaments to which such tenant for life shall be so entitled under the limitations of this my will, such rent-charge to commence from the decease of such tenant for life, with the usual remedies for securing payment thereof."

After these powers came the following residuary devise and bequest: "And as to the residue and remainder of all my said real estate, whether in *England* or elsewhere, and also as to the residue and remainder of my said personal estate, of what nature or kind soever the same may consist, and not hereinbefore specifically devised and bequeathed, I direct that my said trustees shall stand possessed thereof upon trust in the first place to pay and discharge thereout all my debts and funeral expenses," and raise and pay

certain annuities; "and, subject to the payment of the said debts, expenses, and the aforesaid annuities, I hereby direct that my said trustees shall stand possessed of all my said residuary estate upon and for the trusts and purposes, and with, under, and subject to the same or like powers, provisoes, limitations, and conditions in favour of all my children, share and share alike, and their respective issue, as shall correspond with those hereinbefore expressed and declared concerning the estates hereinbefore specifically devised, or as near thereto as the nature of the property may admit, and my said trustees are hereby directed to make such allotments and divisions of my said residuary estate in equal shares accordingly: Provided always, and I hereby declare and direct, that if any child of mine should happen to die in my lifetime, leaving a child or children, or other more remote issue, him or her surviving, such last-mentioned child or children, or other more remote issue, shall, to all intents and purposes, be entitled to all the estate, interest, and benefit whatsoever, whether original or accrued, or accruing, which he, she, or they would have been entitled to in case such child of mine had survived me."

In 1847 the testator's daughter *Angelina* (named in his will) intermarried with *E. H. Gregory*. In contemplation of this marriage a settlement was executed bearing date the 21st of January, 1847, to which the testator was a party. This settlement contained a recital that "upon the treaty for the said marriage it was agreed that the said *William Macdonald* should give with his said daughter a portion of £5000, whereof the sum of £1000 was to be paid to the said *E. H. Gregory* for his own use and benefit, and the sum of £4000 was to be a provision for the said *Angelina Macdonald* and *E. H. Gregory* and their issue, if any;" and the testator thereby covenanted to pay to the trustees of the settlement in his lifetime, or within two years after his death, the sum of £4000 mentioned in the recital, which was to be invested as thereby provided; and the investments were to be held by the trustees upon trust to pay the income of one moiety thereof to the wife for life, and after her death to her husband, if he should survive her, for his life, or until he should assign or incumber the same; and to pay the income of the other moiety to the husband

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for his life, or until he should assign or incumber the same, and then to the wife, if she should be then living, with a discretionary trust after the death of the wife, in case of the determination, in the husband's lifetime, of the trust for his benefit, for the trustees to apply the income during her life for his benefit or that of his children, or any of them, with remainder after the decease of the survivor of the husband and wife for the children of the marriage, as the survivor should appoint, and in default of appointment to the children of the marriage who should attain twenty-one, equally; and in case there should be no child of the marriage who should attain twenty-one, then as *William Macdonald* (the testator) should appoint, and in default of appointment for his next of kin.

The £1000 was paid to *E. H. Gregory* for his own use.

The testator died on the 21st of May, 1852, possessed of some real and leasehold estate and of considerable personalty.

Mrs. *Gregory* survived her husband, and was still living. There was no child of her marriage who attained twenty-one.

Charles Henry Macdonald, one of the testator's children, by his will, dated the 24th of April, 1853, appointed the income of one-third of the property specifically devised to him by the will, and one-third of the income of the residue, both real and personal, to his wife for life. He died in June, 1863, and his wife survived him and became his legal personal representative, and was the Defendant Mrs. *Shaw*.

Edward William Macdonald, another son, by his will, dated the 13th of August, 1861, appointed one-third of the income of all of which he was tenant for life under the will to his wife for life. He died in 1860; his wife survived him, and was the Defendant Mrs. *Boardman*.

Neither *Charles Henry Macdonald* nor *Edward William Macdonald* had any child.

The suit now came on to be heard on second further consideration. Three questions arose: first, whether under the residuary gift in the will any son or daughter of the testator was empowered to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the share of

such son or daughter in the residuary real and personal estate, in addition to such yearly rent-charge as, under the prior clause in the will, might be charged in favour of such widow or surviving husband on the real estate specifically devised to such son or daughter for life; secondly, whether the share of the residuary personal estate given by the will to the testator's daughter *Angelina* was in part adeemed by the testator's payment of £1000 to her husband on her marriage, or by his covenant in the marriage settlement to pay £4000; thirdly, what was the effect of the gift over of the personal estate in the event (which had happened) of the deaths of more than one of the tenants for life without having had children.

Mr. *Roxburgh*, Q.C., and Mr. *Bedwell*, for the Plaintiffs; and Mr. *Mackeson*, Q.C., and Mr. *Freeman*, and Sir *Richard Baggallay*, Q.C., and Mr. *Speed*, for Defendants in the same interest as the Plaintiffs:—

First: the power of appointing an annuity to a husband or wife given to such tenant for life is limited as to amount to one-third of the clear annual income of the specifically devised estate, although such annuity may be charged on and payable out of the residuary estate. Secondly: the gift of residuary personal estate to the testator's daughter *Angelina* is *pro tanto* adeemed by the provision made for her by the testator on the occasion of her marriage. The will was made before the settlement; the case is, therefore, one of ademption, not of satisfaction, and the rules applicable to the two classes of cases are distinct: *Chichester* v. *Coventry* (1). It is clear, from the clause which follows the gift to *Edward William Macdonald*, that the testator intended his children to share equally in his estate. Under these circumstances the presumption against double portions arises. A gift of residuary personalty in a will is adeemed by a subsequent covenant to pay a sum of money in a settlement: *Trimmer* v. *Bayne* (2); *Dawson* v. *Dawson* (3); *Montefiore* v. *Guedalla* (4); *Meinertzagen* v. *Walters* (5); and the circumstance that here the sum covenanted

(1) Law Rep. 2 H. L. 71.
(2) 7 Ves. 508.
(3) Law Rep. 4 Eq. 504.
(4) 1 D. F. & J. 93; 6 Jur. N.S. 329.
(5) Law Rep. 7 Ch. 670.

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to be paid will, by reason of Mrs. *Gregory* having no issue who attained twenty-one, upon her death revert to the testator and form part of his estate, can make no difference in principle. The gift of £1000 to the husband must be treated as part of the provision for the daughter: *M'Clure* v. *Evans* (1); *Watson* v. *Watson* (2).

Mr. *Fischer*, Q.C., and Mr. *Daniel Jones*, for Mrs. *Boardman*:—

The appointment made to Mrs. *Boardman* by her husband's will is valid. The trusts of the residuary personal estate are referential trusts, and are to be construed as if the trusts declared with reference to the specifically devised estate were repeated in the gift of residue. If the tenant for life had been empowered to appoint the whole income of the specifically devised real estate, it could never have been contended that there was no power to appoint the whole income of the residue.

Mr. *Jackson*, Q.C. (Mr. *J. W. Chitty* with him), for Mrs. *Shaw*:—

The tenants for life of the specifically devised estates have power to appoint a share of the income of the residuary estate as well as of the specifically devised estate. The testator's intention was to fix the proportion of the income to be appointed, not to limit the amount of the annuity.

I also submit, on the third point, that a tenant for life who dies leaving no children is not precluded from participating in the distribution of the share of any one of his brothers and sisters who may afterwards die, having had no child.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for other Defendants:—

The question in all cases of satisfaction and ademption is one of intention, and here the limitations of the will and the settlement are so different that the gifts cannot be held to be satisfied or adeemed.

In *M'Clure* v. *Evans* the decision turned on the express directions of the settlor. *Watson* v. *Watson* also turned on special circumstances, and cannot govern the present case.

(1) 29 Beav. 422. (2) 33 Beav. 574.

Mr. *Fry*, Q.C., and Mr. *Maidlow*, for the trustees.

Mr. *Roxburgh*, in reply.

May 27. LORD SELBORNE, L.C.:—

The first question which I have to decide in this case is whether, under the residuary gift in the will, any son or daughter of the testator was empowered to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the share of such son or daughter in the residuary real and personal estate, in addition to such yearly rent-charge as, under a prior clause in the will, might be charged in favour of such widow or surviving husband on the real estate specifically devised to such son or daughter for life.

The scheme of the prior part of the will is to settle upon each of the testator's children (three sons and three daughters) certain specific real estates of values which the testator seems to have intended to make as far as possible equal; each child taking a life interest in the particular property devised for his or her benefit, with remainder to his or her children as tenants in common in tail general, with cross remainders, and with remainders over to the other children of the testator (subject to a question to be after noticed) as tenants in common in tail: the whole of this series of specific devises being followed by certain clauses applicable to all of them, and introduced by these words:—"And I further declare it to be my will that all the trusts above declared in favour of my said children shall be respectively subject to the following powers, limitations, provisoes, and conditions (that is to say)," &c. Of these clauses the first is a provision for the maintenance of any infant tenant for life, and for accumulation of any surplus income during his or her minority; the second provides for the receipt of the rents and profits by tenants for life of full age (as to daughters for their separate use without power of anticipation); the third provides for the maintenance and education of infant tenants in tail. The fourth is in these words:—"And my will is, and I hereby empower every tenant for life under the limitations in this my will contained, either in contemplation of marriage or after

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marriage, to limit or appoint by will to or in favour of any and every person he or she shall marry or have married a yearly rent-charge not exceeding in the whole one-third part of the clear yearly income of the said hereditaments to which such tenant for life shall be so entitled under the limitations of this my will, such rent-charge to commence from the decease of such tenant for life, with the usual remedies for securing payment thereof." After this there follows a power of sale, with provision for the investment of the proceeds of any sale: and then comes the residuary gift, which is referential, and on which this first question arises. It is thus expressed (the testator having first charged the general residuary estate with debts and with certain annuities):—"And subject to the payment of the said debts and expenses, and the aforesaid annuities, I hereby direct that my said trustees shall stand possessed of all my said residuary estate upon and for the trusts and purposes, and with, under, and subject to the same or like powers, provisoes, limitations, and conditions, in favour of all my children, share and share alike, and their respective issue, as shall correspond with those hereinbefore expressed and declared concerning the estates hereinbefore specifically devised, or as near thereto as the natures of the property will admit; and my said trustees are hereby directed to make such allotment and division of my said residuary estate in equal shares accordingly."

If the annuity which a tenant for life was empowered to charge upon the specifically devised estates had been one of (or not exceeding) a fixed annual amount, I should have been of opinion that the general rule stated by Lord *Cranworth* in *Hindle* v. *Taylor* (1) against multiplication of charges under a trust created by reference to other trusts, would have applied; and that it would not have been competent for any child of the testator to charge one annuity of that amount on the property specifically devised, and a further annuity on the share of the residuary estate; though both the residuary estate and the property specifically devised might have been made a security for a single annuity. I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, by the addition of other property to be held on the

(1) 5 D. M. & G. 577, 594.

same trusts, "and subject to the same or like powers," &c., so as to "correspond with" those before expressed as to the property specifically devised, as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion still holds; but the intention is, that the power, limited by that rule, shall be applicable to the added as much as to the original property. I am therefore of opinion that the sons and daughters of the testator were empowered to appoint by will to their wives or husbands annuities charged on their shares of the residuary estate not exceeding one-third of the income of these shares, in addition to the rent-charges on the properties specifically devised.

The next question is, whether the share of the residuary personal estate given to the testator's daughter *Angelina* by his will (which bears date the 5th of December, 1846), was in part adeemed by the testator's payment of £1000 to her husband on her marriage, or by his covenant contained in her marriage settlement (dated the 21st of January, 1847), to pay to the trustees of that settlement in his lifetime, or within two years after his death, the further sum of £4000: the latter sum being settled upon *Angelina* and her husband for their lives, and the life of the survivor (each taking a moiety in possession, and the other moiety by survivorship), with remainder to their children; but so that in the event (which has happened) of *Angelina* dying without having had any child who might live to attain the age of twenty-one years, the capital of this sum of £4000 would revert to the testator. I have to decide this question of ademption, first as to the £4000; and, secondly, as to the £1000.

This question, as has been said, is one of ademption, and not of satisfaction, the will being prior to the settlement. The direction that all the testator's debts are to be first paid out of his residuary estate (the £4000 payable under his covenant with the trustees of the settlement being of course one of his debts) is, under these circumstances, of no importance. There is (as was pointed out in the case of *Chichester* v. *Coventry* (1), in the House of Lords) a material difference in the practical application of the general rule

(1) Law Rep. 2 H. L. 71.

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of equity which presumes against double portions to children in cases of ademption and in cases of satisfaction. In the former class of cases the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself. In the latter it is (strictly speaking) a question of testamentary intention only. When the question is one of testamentary intention, the fact that a gift of a share of residue is preceded by a direction that all the testator's debts shall be first paid may be evidence that a particular debt previously contracted in favour of a child is not intended to be paid out of that child's share of the residue. But when the question is as to the effect of a subsequent covenant to pay money for the benefit of a child, there is neither principle nor authority for the proposition, that this effect can depend upon or be influenced by the presence or absence in a prior will of any mere general provision for the payment of the testator's debts. *Trimmer* v. *Bayne* (1) and *Dawson* v. *Dawson* (2) are express authorities to the contrary; and I am of opinion that, so far as relates to the £4000, the present case is governed by those authorities and by others of a like nature, and that the residuary personal estate must in this case be divided as if the £4000 payable to the trustees of *Angelina's* settlement were brought into hotchpot. It makes, in my opinion, no difference, either as to the principle, or as to the manner of its application, that (in the events which have happened) the capital of this £4000 will return under the trusts of that settlement to the testator's estate, and be itself (as an interest now reversionary) re-distributable as part of the residue of that estate.

As to the £1000, which (though expressed to be given by her father as a marriage portion) was paid absolutely to *Angelina's* husband, I am of opinion that it was not an ademption of any part of the share of residue given to *Angelina* for her life, with remainder to her children, by the testator's will. Nothing is directly given to the husband by the will: and by the contract of marriage no interest in this £1000 was settled on *Angelina* or her children. The Court has been in the habit of disregarding differences in the manner of settling gifts on a child or child's family by different instruments which raise a question of ademption or satisfaction, when

(1) 7 Ves. 508. (2) Law Rep. 4 Eq. 504.

such differences appear to be in their nature consistent with the presumption that the one gift is meant to be substituted for the other. But I am not aware that this presumption has ever been held to arise (in the absence of express direction) when the persons taking under the several instruments are themselves altogether different. Under such circumstances I think that an intention to substitute the one gift for the other ought not to be presumed, and that it makes no difference whether the word "portion" is or is not used. It is true that the daughter had here a power under the will to appoint one third part of the income of her share of residue to her husband for his life, but I do not think that the mere existence of such a power, which it depended on her to execute or not as she might think fit, can at all vary the case.

[His Lordship then stated that he had found more difficulty than he expected in coming to a final conclusion on the third point, which had been but slightly touched on in the argument; and requested that it might be further considered by counsel and further argued.]

June 3. The further argument on the third point now took place.

Mr. *Roxburgh*, Q.C., and Mr. *Bedwell*, Mr. *Mackeson*, Q.C., and Mr. *Freeman*, Mr. *Southgate*, Q.C., and Mr. *Everitt*, Sir *R. Baggallay*, Q.C., and Mr. *Speed*, and Mr. *Fischer*, Q.C., and Mr. *D. Jones*, contended that the period at which the class to take under the gift over upon the death of a child without issue, was the death of the tenant for life. This was clearly provided for in the event of one child only being then living, and it could not be supposed that the testator had a different intention if several of his children happened to survive a tenant for life: *Madden* v. *Ikin* (1).

Mr. *Jackson*, Q.C., and Mr. *J. W. Chitty*, for Mrs. *Shaw*:—

The gift of the personal estate is to correspond as nearly as possible with the gift of the specifically devised real estate, and the first question is, what is the meaning of the expressions the testator has used in the specific devise. Now it is clear that the testator meant to have a complete series of limitations under which each child was

(1) 2 Dr. & Sm. 207; S. J. vol. 11. 1168

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to take for life, and then the issue of that child, and nothing was to go over until such issue was exhausted. The class to take cannot, under the gift over, be ascertained, therefore, until there has been a failure of issue of a tenant for life, which as regards personalty would be beyond the perpetuity limits: there is therefore an intestacy as regards the shares of personalty of those children who have died without issue. Another possible construction is, that the gift over is to the other children of the testator; and however capricious such a disposition may be, it cannot be set aside if the true construction of the will leads to it. These words "then living" need not stand in the way of such a construction; for the word "survivor" might be read "other": *Waite* v. *Littlewood* (1); *Badger* v. *Gregory* (2); *Hurry* v. *Morgan* (3); *Hodge* v. *Foot* (4).

LORD SELBORNE, L.C.:—

I am very glad that I have had the benefit of this further argument, because it has enabled me to see more clearly what the true interpretation of the ultimate gift of the personalty is. It must all depend, of course, upon the true construction of the gift of the realty to which it refers. Now, the scheme of the gift of the realty, in my judgment, is that which Mr. *Jackson* and Mr. *Chitty* have contended for; that is to say, there is to be no gap in the series of estates tail and cross remainders, but the whole is to continue in the direct line of the testator's descendants so long as there are issue of any of the children, and nothing is to go over under the words "failing such issue" until the complete exhaustion of all the issue of all the children. That, I think, upon sound principles of construction, is reasonably clear, whatever difficulty there may be in dealing with the particular words "then living," as they occur; if it be possible to deal with those words so as to produce that effect, I am clearly of opinion that the general scheme of the limitations guides one and obliges one to adopt and prefer the construction which will produce that effect.

That being so, the view which I have taken of these limitations is this: here is to each of these children a particular real estate given only for life. The parent in no instance took more than a

(1) Law Rep. 8 Ch. 70.
(2) Ibid. 8 Eq. 78.
(3) Law Rep. 3 Eq. 152.
(4) 34 Beav. 349.

life estate at the beginning. Then follow exhaustive limitations, with cross remainders, in tail, to the children of the tenant for life; and then follow the limitations in question to the testator's other children and the heirs of their bodies, with cross remainders. Those last limitations, evidently, are contingent limitations of double aspect, either to vest estates tail in them by purchase in remainder upon the life estate if the tenant for life should have no children in whom the estate tail given to his children can vest, or as contingent remainders expectant upon the determination of the prior estate tail, supposing an estate tail to vest in any child or children of the tenant for life. But then come in these words, "then living." And it is to be observed, that if they can be applied in any sense which will limit and define the class of children, they will make this difference, that nothing which has not actually accrued will vest in a particular child of the testator who may afterwards die without himself leaving issue, so as to enable that child to bar the subsequent remainders. Two constructions are suggested; the one, that contended for by Mr. *Mackeson* and those who followed him, and which in the first instance I was inclined to adopt, but which I am not now disposed to adopt, although I come by another road to a conclusion equally favourable to Mr. *Mackeson's* clients; that was, that the words "then living" mean living at the death of the tenant for life. I do not think it possible to adopt that construction upon this context with regard to the real estate. The event, to which the word "then" would seem to refer, is that described by the words "failing such issue," which will be applicable not only if there should be no issue living at the death of the tenant for life, but if that issue should fail at any subsequent time, however remote. If that is so, then the use of the words "then living" seems excessively arbitrary, however interpreted, if it is applied literally to the single case of there being one child, and only one, then living, who should take; and I cannot but think that, whatever its true interpretation is, it is a sound rule to take the indication contained in those words as extending to the whole of the class, the existence of one only of whom is in that case supposed; and therefore I read the passage thus, "and failing such issue of my said daughter *Angelina* in trust for my other children equally,

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and the heirs of their respective bodies, as tenants in common; or if there be only one of my children, in trust for that child only, and the heirs of his or her body; with the qualification "then living," whatever it means, pervading the whole gift, both in the case of plurality and in the case of there being only one; and for that construction, besides the reason of the thing, I think, if it were necessary, some authority could be found; I rather think that it will be found that the case of *Pearce* v. *Edmeades* (1) will illustrate that mode of applying words occurring in a somewhat similar context. The case which Mr. *Mackeson* mentioned of *Madden* v. *Ikin* (2) would do the same; and I do not doubt that more authorities could be found for that, if needful.

How, then, are we to construe the words "then living"? I have already said I cannot agree that it means necessarily or alone living at the death of the tenant for life—a construction by which you would exclude altogether a large class of issue who might be in existence of any children previously dead who might have left issue: and the latter part of the will containing the residuary gift, which we are now construing, appears to me clearly to shew that the testator could not have meant and did not mean that.

I think that upon this context the real construction to be placed upon those words "then living," is what may be called a stirpital construction; that is to say, all the stocks which should be then living. It is to be observed that it occurs in this context, "in trust for my other children and the heirs of their respective bodies;" and then again, immediately afterwards, "and if there be only one of my children then living, in trust for that child only and the heirs of his or her body." By representation, and in a sense which probably is practical enough to be the most likely explanation of the frequent use of the word "survivors" in a sense equivalent to "others," as, I think, I pointed out in the case of *Waite* v. *Littlewood* (3)—where the intention of the testator is to provide for a stirps if the stirps is living, the line of the parent is continued in the issue. Supposing that construction to be adopted, it will then be thus: "Failing such issue of my said

(1) 3 Y. & C. Ex. 246. (2) 2 Dr. & Sm. 207, 8 Jur. N.S. 1166

(3) Law Rep. 8 Ch. 70.

son *Charles*, in trust for my other children who, or the heirs of whose bodies, may be then living, equally, and the heirs of their respective bodies, as tenants in common; and if there be only one of my children who, or the heirs of whose body, shall be then living, in trust for that child only, and the heirs of his or her body." I think, the case not being entirely free from difficulty, that this is the soundest construction to be put upon the gift of the real estate.

Passing from that to the gift of the residuary estate, which is referential, I find strong confirmation there, at all events as applied to that gift, of the manner in which I have ventured to deal with the words "if there be only one of my children then living;" because, as has been very properly pointed out in the argument, there is, in direct context with the gift which we are now construing, this provision: "provided always, and I hereby declare and direct, that if any child of mine shall happen to die in my lifetime, leaving a child or children, or other more remote issue, him or her surviving, such last-mentioned child or children, or other more remote issue, shall to all intents and purposes be entitled to all the estate, interest, and benefit whatsoever, whether original or accrued or accruing, which he, she, or they would have been entitled to in case such child of mine had survived me":— providing, it is to be observed, only for the case of a death in his lifetime of a child who leaves issue; which, according to the construction I have ventured to put upon the earlier part of the will, was the only case not provided for, or not clearly provided for; and here he provides for that, in a manner which makes it impossible, in this latter part of the will, applying the language of the earlier part, to take the words, "if there be only one of my children then living" in a sense exclusive of the issue then living of a child of the testator who had died in his own lifetime. That, I think, is a very strong confirmation of the construction which I have placed upon the words "then living," as they occur, in the earlier passage.

Then, having the benefit of that construction, what is the effect of the referential part of the clause? He says, "subject to the payment of the debts," and so on, "I hereby direct that my said trustees shall stand possessed of all my said residuary estate, upon and for

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the trusts and purposes, and with, under, and subject to the same or like powers, provisoes, limitations, and conditions in favour of all my children, share and share alike, and their respective issue, as shall correspond with those hereinbefore expressed and declared concerning the estates hereinbefore specifically devised, or as near thereto as the nature of the property will admit." He takes notice of the distinction between real and personal estate. As to any real estate which passed under that residuary gift, it is to go to the same uses with that specifically devised, only in equal shares between them. With regard to personalty, it is to go as nearly as the nature of the property will admit; which, of course, means that when you come to the first tenant in tail of the realty the personalty shall vest absolutely in that tenant in tail. Who, then, applying the words of reference, would, according to the construction which I have put upon the gift of the realty specifically devised, be the first tenant in tail of the realty? I apprehend, in the event of the death of any tenant for life without having had any issue, which is the case we are dealing with, according to that construction the next gift would be to such of the testator's other children who, or any issue of whom, would then be living—not the issue taking as purchasers, but the child, although himself then dead, if he comes within that description. That excludes all who had previously died without having had any issue living at the time when the gift over took effect. It lets in all who at that time had issue living; and that, I think, is the true construction. In all these cases, where you have to deal with a gift of personalty upon uses as nearly as may be corresponding with those of the realty, the remoter issue can only take through the chance of getting some benefit from an interest which is vested absolutely in the parent. In this case, whether the parent be living or dead, he is one of the class, according to the construction which I put upon the will, if, at the time when the tenant for life dies and his share goes over, he is himself in life, or is represented at the time by living issue. The practical result, therefore, is the same as that which I was inclined to arrive at before.

Solicitors: Mr. *T. W. Denby;* Messrs. *Nicholson, Nicol, & Son;* Messrs. *Field, Roscoe, & Co.;* Mr. *Chamberlain.*

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[1872 A. 7.]

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Settlement—Illegal Consideration—Marriage with Deceased Wife's Sister—Setting aside Settlement—Particeps Criminis.

A Court of Equity will not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument.

A widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a deed by which it was recited that he was desirous of making a settlement and provision for the lady, and had transferred certain shares into the names of trustees upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint; and they afterwards lived together as man and wife until the widower's death. Ten years after such death, and some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad and illegal consideration:—

Held, that the suit could not be maintained.

ON the 18th of September, 1861, *William Hardinge*, a widower, went through the ceremony of marriage with *Isabella Buckton*, spinster, the sister of his deceased wife. Two days previously he had executed an indenture, made between himself of the first part, *Isabella Buckton* of the second part, and trustees of the third part, whereby, after reciting that he was entitled to ten shares in the *Alliance Marine Assurance Company*, and to sixteen shares in the *London Chartered Bank of Australia*, and that he, being desirous of making a settlement and provision for *Isabella Buckton*, had proposed and agreed to transfer the said shares to the trustees upon the trusts thereinafter declared, and after reciting (as the fact was) that he had, previously to the execution of the indenture, transferred the shares to the trustees, it was witnessed that, in pursuance of the said agreement and in consideration of the premises, it was thereby agreed and declared that the trustees should stand possessed of the shares upon trust to receive the income and pay the same to *Isabella Buckton* during her life, for her separate and

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inalienable use, and after her death upon trust for such person or persons, and for such intents and purposes, as she should by deed or will appoint, and in default of and subject to any such appointment, in trust for such persons as, under the Statutes of Distribution, would at the time of her death have been entitled to her personal estate in case she had died intestate and without leaving a husband.

William Hardinge and *Isabella Buckton* lived together as man and wife from the 18th of September, 1861, down to the 20th of January, 1862, when *Wm. Hardinge* died without issue and intestate. The Plaintiff was his legal personal representative.

In 1870 *Isabella Buckton* married *Benjamin George Jenkins*. No settlement was made on the occasion of the marriage.

The estate of *Wm. Hardinge* was administered by the Court. All his creditors had been paid; and the present suit was instituted in January, 1872, at the desire of the persons beneficially entitled to his estate, against Mr. and Mrs. *Jenkins* and the surviving trustee of the settlement.

The bill alleged that the indenture of the 16th of September, 1861, was made in contemplation and consideration of the then intended unlawful cohabitation of *Isabella Buckton* and *Wm. Hardinge*, and that there was no other consideration for the settlement than such intended unlawful cohabitation; and it prayed for a declaration that the indenture was founded on a bad and illegal consideration, and was void; for an order directing the surviving trustee of the settlement (in whose name the shares were standing), if necessary, to transfer the shares to the Plaintiff; and for an account of the dividends.

Mrs. *Jenkins*, by her answer, stated that *Wm. Hardinge* proposed to marry her in June, 1861, and that she accepted the offer without reserve or condition, expressed or implied; that it was not proposed or suggested to her that *Wm. Hardinge* should make any settlement upon her until some months after her acceptance of his offer, and that when he did propose to settle the shares on her for her exclusive benefit she regarded such settlement as a free and voluntary gift, and prompted only by his affection for her, which affection was the sole consideration for the settlement. She further stated that she did not consider herself, nor to the best of her

belief did *William Hardinge* consider her, bound in any sense by the fact of such settlement to marry, or go through the ceremony of marriage, or cohabit with him.

In support of the Plaintiff's case, a memorandum was put in evidence which was stated by Mrs. *Jenkins* to have been written by *William Hardinge* in her presence a few weeks before the ceremony of marriage. It was in the following terms:—"Deed of gift to *I. B.* co. ca. Mrs. *H.* to be drawn up so that everything in my possession may become hers (except my military pay) and should I die before her my wish is that if she marries again, the property, whatever at the time it may be, be so fixed upon her that her next husband cannot deprive her of it in any way and should she have issue that the property be so paid according to law that any children of mine from *I. B.* will in every way be protected from any husband she may marry again, if I should die before her and should any property from my sister according to her will should out I live (*sic*) her and her husband my particular wish is that *I. B.* c. c. Mrs. *H.* may receive it." The contractions "*I. B.* co. ca. Mrs. *H.*" and "*I. B.* c. c. Mrs. *H.*" were explained to mean *Isabella Buckton*, commonly called Mrs. *Hardinge*.

Mr. *Fry*, Q.C., and Mr. *W. Barber*, for the Plaintiff:—

Previously to the 16th of September, 1861, *William Hardinge*, the settlor, transferred the shares in question into the names of strangers. A resulting trust in his own favour was thus created, and is still subsisting unless a valid trust has since been declared by the settlor. The indenture of the 16th of September cannot be regarded as a valid declaration of trust; for it is plain from the document coming from Mrs. *Jenkins*' possession, that the indenture was made in contemplation of a cohabitation under colour of a ceremony of marriage known both by her and the settlor to be invalid. Marriage between a widower and his deceased wife's sister is prohibited by Act of Parliament, and is contrary to public policy; and where considerations of public policy come in, the maxim, "*In pari delicto melior est conditio possidentis*," does not apply. *Story's* Equity Jurisprudence (1); *St. John* v. *St.*

(1) Sect. 298.

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John (1); *Law* v. *Law* (2); *Hatch* v. *Hatch* (3). It is the duty of the Court to uphold the law, and to discourage by every means in its power every attempt to break it. The Court, therefore, will interfere actively to set aside a settlement made in contemplation of such an illegal marriage: *Chapman* v. *Bradley* (4); *Coulson* v. *Allison* (5). In the last cited case Lord *Campbell*, in giving judgment (6), expresses himself thus: "Supposing *Nicholson* and *Ann Welbank*" (the widower and his deceased wife's sister) "to have been aware of the true state of the law, and to have nevertheless agreed to cohabit together, she being his mistress and not his wife, it seems to me that the deed would then have been impeachable on the ground of immorality, for nothing can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives."

In *Wootton* v. *Wootton*, before Vice-Chancellor *Stuart* on the 9th of June, 1869, His Honour sat aside a similar deed at the instance of the widower, the settlor. It has been ascertained that the decree in that case, although not consented to, was not strongly contested: still the case is valuable as shewing the opinion of the learned Judge that the Court has jurisdiction to make such a decree.

Even if the Court would not interfere to set aside the deed at the instance of the settlor, it might do so at the instance of his legal personal representative: *Matthew* v. *Hanbury* (7).

Mr. *Roxburgh*, Q.C., and Mr. *Charles Walker*, for the Defendants:—

The shares have legally been transferred to the trustees of this settlement. The settlement is on the face of it valid, and places the equitable interest at the absolute disposal of Mrs. *Jenkins*, who must therefore be treated as the owner of the shares. If, on the 16th of September, *William Hardinge* had made to her a present of money, or transferred the shares to her absolutely, he

(1) 11 Ves. 526.
(2) 3 P. Wms. 391.
(3) 9 Ves. 292.
(4) 33 Beav. 61; 9 Jur. N.S. 1046
(5) 2 Giff. 279; 2 D. F. & J. 521.
(6) 2 D. F. & J. 525.
(7) 2 Vern. 187.

(4) S.C. 4 De G. J. & S. 71: 10 Jur. N.S. 55
(5) S.C. 6 Jur. N.S. 1140

could not have recovered the money or set aside the transfer even if she had afterwards refused to cohabit with him. This is clearly so at law: *Howson* v. *Hancock* (1). The interposition of a trustee can make no difference; in equity the transaction must be looked upon as complete; Mrs. *Jenkins* is as much mistress of the property as if it were money in her pocket, and she cannot be deprived of it: *Story's* Equity Jurisprudence (2). In *Rider* v. *Kidder* (3), *Rider* transferred stock into the joint names of himself and *Ann Kidder*, his mistress; and a decree was made after his death that *Ann Kidder* should transfer the stock into the name of *Rider's* personal representative; but that decision rested on the ground that there was, by implication of law, a resulting trust in favour of *Rider*, and no evidence was adduced to rebut the implication. It is impossible to read Lord *Eldon's* judgment in that case without coming to the conclusion that if there had been there a declaration of trust such as there is here the decision would have been the other way.

Wootton v. *Wootton* cannot be treated as an authority, and none of the other cases cited apply. In *Chapman* v. *Bradley* (4) the trust declared was for the settlor until marriage. No valid marriage took place; and therefore the beneficial interest never left the settlor. *Coulson* v. *Allison* (5) was decided on the ground that the lady who made the settlement was led to suppose that her marriage would be valid.

Although it is said in the judgment in *Matthew* v. *Hanbury* (6) that the legal personal representative of a settlor may set aside a settlement where the settlor could not, the decision was founded on a different ground; and the proposition is entirely contrary to principle.

Finally, the Plaintiff is debarred by lapse of time from the relief he seeks.

Mr. *Fry*, in reply, cited *Gray* v. *Mathias* (7); *Muckleston* v. *Brown* (8); *Birch* v. *Blagrave* (9).

(1) 8 T. R. 575.
(2) Sect. 299.
(3) 10 Ves. 360.
(4) 33 Beav. 61.
(5) 2 Giff. 279; 2 D. F. & J. 521.
(6) 2 Vern. 187.
(7) 5 Ves. 286.
(8) 6 Ibid. 52.
(9) Amb. 264.

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July 7. LORD SELBORNE, L.C.:—

Mr. *William Hardinge*, a widower of mature age, having agreed with *Isabella Buckton*, the sister of his deceased wife, to cohabit with her under colour of a fictitious marriage (both parties must be taken to have known that a real marriage was impossible, and there is no suggestion of fraud, deceit, or mistake, on either side), transferred on the 16th of September, 1861, into the names of trustees named *Buckton* and *Downes*, certain shares belonging to him in the *Alliance Marine Assurance Company* and the *London Chartered Bank of Australia*, upon trusts declared by a contemporaneous deed, to which the settlor, the trustees, and the lady, were parties. These trusts were in effect for the immediate, absolute, and unconditional benefit of the lady, without any power of revocation; the income being secured to her for her separate use, in the event of any future coverture; and no provision being made, in that or any other event, for children. The lady is described in this deed as a spinster; it is voluntary on the face of it; the expressed motive being, that Mr. *Hardinge*, "being desirous of making a settlement and provision for her," had proposed and agreed to assign and transfer the shares upon these trusts. The lady was previously informed by Mr. *Hardinge* of his intention to make this settlement; but she states in effect (and there is no evidence of the facts beyond her statements) that he did so some months after the cohabitation had been agreed upon; that there was no bargain or contract between them for any settlement; that she regarded it as a free and voluntary gift; and that it was not offered by him, nor accepted or understood by her, as binding her to the fulfilment of the promise of cohabitation previously made. She also produces a paper, written by Mr. *Hardinge* in her presence and communicated by him to her, after their agreement to live together and some time before the date of the deed. This document purports to contain instructions to Mr. *Hardinge's* solicitor to prepare a "deed of gift" to the lady of all his property, with provisions for any children who might be born of his connection with her in the event of her marrying after his death. In this paper she is described as "*I. B.* co. ca. Mrs. *H.*," meaning, evidently, "*Isabella Buckton*, commonly called Mrs. *Hardinge*." These instructions, however, were not acted upon, unless

it ought to be presumed that they, in some unexplained manner resulted in the execution of the deed of the 16th of September, 1861, of which the subject-matter was much more limited and the provisions materially different.

Two days after the date of the deed Mr. *Hardinge* and his sister-in-law went through the form of a marriage ceremony; and they lived together till his death, which happened four months afterwards. The lady has ever since enjoyed the full benefit of these trusts; and in April, 1870, she married a Mr. *Jenkins* without any settlement, doubtless relying on the provision so made for her. The present Plaintiff became the legal personal representative of Mr. *Hardinge* in 1866; and in January, 1872, he filed this bill in that character (not on behalf of creditors, for no creditors of Mr. *Hardinge* are alleged to exist), seeking to set aside the deed, as founded on an illegal consideration, and therefore void, and asking for a re-transfer, "if necessary," of the shares from the surviving trustee, Mr. *Downes*. The question which I have to decide is whether he is entitled to this relief.

In the first place, it has been argued that, even if Mr. *Hardinge* himself could not have maintained such a suit, his legal personal representative is entitled, under these circumstances, to do so; and for this position *Matthew* v. *Hanbury* (1), decided in the time of the Lords Commissioners *Trevor*, *Rawlinson*, and *Hutchins*, is cited. But what is reported to have been said on this point in *Matthew* v. *Hanbury* (if it is correctly reported, which may reasonably be doubted) is, after all, a mere *dictum*, not necessary to the decision. No support is given to such a doctrine by any later authority, and I hold it to be erroneous and contrary to law.

Would, then, Mr. *Hardinge* himself have been entitled to set aside this deed, if he had come into Court for that purpose, upon evidence similar to that now produced, and after an equal lapse of time?

It was said that he might do so, because it is contended to be the duty of this Court to discourage, on the ground of public policy, by all possible means, fictitious marriages between persons within the prohibited degrees of consanguinity or affinity. But I am not aware of any law which has imposed that particular duty

(1) 2 Vern. 187.

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on this Court. So far as the power of moral censorship is committed to any of the Courts of this country, it belongs, not to this but to a different jurisdiction. The policy of the law (and, therefore, of this and every other Court in the realm) is, no doubt, opposed to all immorality and to all unlawful cohabitation; but the equitable doctrines applicable to such cases do not depend upon, and do not vary with, the species or degree of immorality in each particular case. The law matrimonial contents itself with making marriage between persons standing in certain relations to each other absolutely impossible, without attaching special penalties to the abuse by those persons of religious or other forms or ceremonies.

Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon* v. *Nettlefold* (1). Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law, and not liable (unless there are other elements in the case) to be set aside in Equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law, and therefore, of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. 4. If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. 5. Under some (but not under all) circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity.

In the cases of this class there has been no actual transfer of property from the obligor or covenantor to the obligee. The contract has always remained *in fieri*: the bond or covenant conferred a mere right of action, and conferred that right only if there was a good and lawful consideration, which, in the absence of evidence to the contrary, the law would presume from an instrument under seal. If the consideration is unlawful there is no legal obligation; and if the proof of such illegal consideration depends

(1) 3 Mac. & G. 100.

on extrinsic evidence, and does not appear on the face of the instrument, a Court of Equity may, for that reason, give relief, upon the principle explained by Lord *Cottenham* in *Simpson* v. *Lord Howden* (1).

In the present case relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the Defendant. I know no doctrine of public policy which requires, or authorizes, a Court of Equity to give assistance to such a Plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular Plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to iniquity. If public policy is opposed (as it is) to vice and immorality, it is no less true, as was said by Lord *Truro* in *Benyon* v. *Nettlefold* (2), that the law, in sanctioning the defence of "*particeps criminis*," does so "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." It is a maxim of law not opposed to any equity, that "*in pari delicto melior est conditio possidentis;*" and it is a principle of equity, that long delay in seeking to rescind a transaction originally voidable, on the faith of which other persons have irrevocably made their arrangements in life, may operate as a bar to relief.

A *dictum* of Lord Chancellor *Campbell* in *Coulson* v. *Allison* (3), and a decree of Vice-Chancellor *Stuart* in *Wootton* v. *Wootton*, were cited at the bar as authorities for the proposition that a completed

(1) 3 My. & Cr. 97. (2) 3 Mac. & G. 102.
(3) 2 D. F. & J. 525.

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transfer of property, like that now in question, ought to be set aside on grounds such as those relied upon by the Plaintiff in this case. But Lord *Campbell's* words had reference to a supposed state of things very different from that with which I have to deal; and the same observation applies to *Wootton* v. *Wootton*, which was the case of a mutual settlement, made on the occasion of one of these fictitious marriages, from which both parties desired, or were at least willing, to be relieved. It may be that the door of this Court is not closed against persons repenting of such an unlawful connection, and desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it. But in a case presenting no such circumstances, I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the Defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law. In *Whaley* v. *Norton* (1) the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this Court would extend relief as to things executory, which, if done, it may be might stand." In *Matthew* v. *Hanbury* (2), a case already referred to, the same principle was, by implication, recognised, the Court saying that "whereas the trustees had declared a special trust for a particular purpose, as to one of the debts, that will not avail, there being no proof that the testator was privy thereunto, or directed such trust." And in *Rider* v. *Kidder* (3) Lord *Eldon* asked whether there had been any case upon the distinction between a recompense for past, and a provision for future cohabitation, "where the Court, finding the woman in actual possession of the property, has upon that ground taken it out of her hands? The distinction," he added, "upon the doctrine of *præmium pudicitiæ* has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors." And Lord *Eldon's* final decision in that case proceeded upon grounds irreconcilable,

(1) 1 Vern. 483. (2) 2 Vern. 187, 188.

(3) 10 Ves. 366.

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in my opinion, with the supposition that he would have granted any relief if the stock there in question had been proved by evidence to have been transferred into the joint names of the transferor and his mistress, with the intention of making the man a mere trustee for the woman, and vesting in her the immediate and absolute beneficial interest.

My judgment upon the whole of this case is adverse to the Plaintiff. There is no legal ground on which the efficacy of the transfer of the shares in question can be disputed; and, so far as equitable considerations enter into the case, they appear to me to be in favour of the Defendant. The bill must be dismissed with costs.

Solicitors: Mr. *J. K. Wright*; Messrs. *Wilkinson & Son.*

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[1858 H. 155.]

*Practice—Costs—Payment out of Fund in Court—Disbursements by Solicitor—Interest—*33 & 34 *Vict. c.* 28, *s.* 17.

The 17th section of the Act 33 & 34 Vict. c. 28, which enables the Taxing Master upon a taxation of costs to allow interest on moneys disbursed by a solicitor for his client, is intended to apply only as between a solicitor and his own client, and does not apply to a taxation of costs to be paid as between solicitor and client out of a fund in Court belonging wholly or partly to other persons than the client.

THIS was an adjourned summons asking that the Taxing Master might be directed to review his certificate.

The suit was instituted by the Plaintiffs, the mortgagees of two third shares of certain real estate, called *Lypiatts*, for foreclosure. At the hearing on the 6th of July, 1869, a decree was made for sale of the undivided estate, the parties interested in the remaining one-third share appearing and undertaking to concur therein. Under this decree sales of parts of the property took place in 1860, 1862, and 1868. The proceeds of sale were paid into Court and invested; and part of such investments had been applied

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in paying off the principal and interest due on the Plaintiffs' mortgage.

By the order made upon further consideration, on the 16th of November, 1871, it was ordered that it be referred to the Taxing Master to tax the costs of all parties to the cause as between solicitor and client, including in the costs of the Plaintiffs any costs, charges, and expenses properly incurred by them as mortgagees, and in relation to the hereditaments called *Lypiatts*, whether in or about the sales thereof, or otherwise, beyond their costs of suit; and that these costs when taxed should be raised and paid out of certain bank annuities in Court standing to an account entitled "The account of the proceeds of sale of *Lypiatts*;" and that the residue of the fund should be divided in manner therein mentioned among the persons entitled to the property.

In the bill of costs carried in under the taxation directed by the order of the 16th of November, 1871, the solicitors of the Plaintiffs (who had the conduct of the sales) charged interest upon disbursements made by them in respect of the sales and otherwise; and they claimed to be entitled to such interest under the provisions of the Act 33 & 34 Vict. c. 28, s. 17 (1). The Taxing Master disallowed the claim, on the ground that the discretion thereby given to Taxing Masters to allow interest was confined to the dealings between the solicitor and his own client, and that it was not applicable to cases of taxation where the costs were payable to a party out of a fund belonging to others, in which the allowance of interest is not claimed for the solicitor personally, but by or on behalf of the client.

The object of the summons was to obtain the allowance of interest.

Mr. *Buchanan*, for the Plaintiffs, submitted that the words of the Act were wide enough to include such a case as the present.

[LORD SELBORNE, L.C.:—The 17th section of the Act on the

(1) Sect. 17 of 33 & 34 Vict. c. 28, is as follows: "Subject to any general rules or orders hereafter to be made, upon every taxation of costs, fees, charges, or disbursements, the taxing officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client, and on moneys of the client in the hands of the attorney or solicitor, and improperly retained by him."

face of it is confined to dealings between the solicitor and his own client: it does not say that where any one else is ordered to pay costs he is to be charged with interest.]

The parties entitled to the property have had the benefit of these disbursements; the fund arising from the sale has been invested and produces interest; it is therefore reasonable that interest should be given on the disbursements. An analogous provision is that contained in 23 & 24 Vict. c. 127, s. 27, allowing interest on costs; and under that enactment the Court, in directing payment out of the proceeds of sale of mortgaged property of the mortgagees' principal, interest, and costs, has allowed interest on the costs: *Whitfield* v. *Roberts* (1).

LORD SELBORNE, L.C.:—That was the case of a judgment debt. I take the effect of the present enactment to be this: Clients often find it convenient to obtain advances from their solicitors; according to the old practice solicitors were not at liberty to charge interest on these advances; now they are, but there is nothing in the Act to charge anybody else with that interest than the client. The Act speaks of disbursements by the solicitor for his client; if the client had power to borrow, and charge the fund with the amount borrowed, then the solicitor might possibly have interest; but that is not the present case.

Mr. *Goren*, for some of the Defendants.

Mr. *Terrell*, for other Defendants, submitted that the summons ought to be dismissed with costs, on the ground that the Act was not retrospective.

LORD SELBORNE, L.C.:—

It is not necessary to decide that, because I think the Taxing Master has taken a sound view of the Act, which was intended to apply only as between a solicitor and his own client; but the question was a very proper one to bring before the Court, and I shall not give costs against the Plaintiffs.

Solicitors: Messrs. *Morley & Shirreff*; Mr. *Goren*; Mr. *Cowlard*.

(1) 9 W. R. 844; 7 Jur. N.S. 268

V.-C. M.

1873

June 5.

GREENWOOD *v.* WADSWORTH.

[1873 G. 55.]

New Burial-Grounds—Prohibition as to Locality—General Enactment—Application to special Nonconformist Ground—Burial Acts (15 & 16 *Vict. c.* 85; 16 & 17 *Vict. c.* 134; 17 & 18 *Vict. c.* 87; 18 & 19 *Vict. c.* 128).

In the Acts of Parliament now in force relating to the burial of the dead certain provisions are contained requiring the consent of the owner and occupier of any dwelling-house within 100 yards of any new burial-ground to be given before it is used for burials:—

Held, that the words prohibitive of opening new burial-grounds being general, are not restricted by other parts of the Acts importing that they only apply to grounds established by burial boards under the Acts, and that the prohibition extends to burial-grounds established by special Nonconformist societies for the use of their members.

THIS was a motion for an injunction to restrain the Defendants, who were the trustees of a Particular Baptist chapel at *Rawdon*, in *Yorkshire*, from using for burials a new burial-ground which they had laid out as an addition to one already existing near their chapel, and used for the burial of members of their society, or any part of it which was within 100 yards of two houses of which the Plaintiffs were owners.

The property of the Plaintiffs consisted of a piece of ground, on part of which stood the two houses in question. It was bounded by a narrow lane, on the opposite side of which was the land which belonged to the Defendants as trustees of the chapel. Part of it was occupied by the chapel and part by their old burying ground. They had recently laid out another portion of their land as an additional burial-ground. This new portion was within 100 yards of the Plaintiffs' houses.

The question as to the right to use the piece of ground so set apart depended upon the construction of certain clauses of the several Acts now in force relating to the appropriation and use of new burial-grounds, commencing with that of the 15 & 16 Vict. c. 85. This Act originally applied only to the metropolis, but its operation was afterwards extended; and the Plaintiffs relied upon

sects. 9 and 25 (1), the former of which prohibited the establishment of new burial-grounds within 200 yards of any house. The operation of this Act was extended by 16 & 17 Vict. c. 134, the 1st section of which empowered Her Majesty in Council, on the representation of one of Her principal Secretaries of State, to prohibit the opening of new burial-grounds in any city or town in *England* save with the approval of one of such Secretaries of State; and the 7th section extended certain sections of the Act of 15 & 16 Vict. c. 85, including sect. 25, and made them applicable to parishes not in the metropolis (2).

(1) Sects. 9 & 25 of 15 & 16 Vict. c. 85, are as follows:—

"9. No new burial-ground or cemetery (parochial or non-parochial) shall be provided and used in the metropolis, or within two miles of any part thereof, without the previous approval of one of Her Majesty's principal Secretaries of State."

"25. Every burial board shall, with all convenient speed, proceed to provide a burial-ground for the parish or parishes for which they are appointed to act, and to make arrangements for facilitating interments therein; and in providing such burial-ground the board shall have reference to the convenience of access thereto from the parish or parishes for which the same is provided; and any such burial-ground may be provided either within or without the limits of the parish, or all or any of the parishes, for which the same is provided; but no ground not already used as or appropriated for a cemetery shall be appropriated as a burial-ground or as an addition to a burial-ground, under this Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house."

(2) Sects. 1 and 7 of 16 & 17 Vict. c. 134, are as follows:—

"1. In case it appear to Her Majesty in Council, upon the representation of one of Her Majesty's principal Secretaries of State, that for the protection of the public health the opening of any new burial-ground in any city or town, or within any other limits, save with the previous approval of one of such Secretaries of State, should be prohibited, or that burials in any city or town, or within any other limits, or in any burial-grounds or places of burial, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for Her Majesty, by and with the advice of her Privy Council, to order that no new burial-ground shall be opened in such city or town, or within such limits, without such previous approval, or (as the case may require) that after a time mentioned in the order, burials in such city or town, or within such limits, or in such burial-grounds or places of burial, shall be discontinued wholly, or subject to any exceptions or qualifications mentioned in such order, and so from time to time as circumstances may require; provided always, that notice of such representation, and of the time when it shall please Her Majesty to order the same to be taken into consideration by the Privy Council, shall be published in the *London Gazette*, and shall be affixed on the doors of the churches or

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The limit within which the consent of the owners of buildings was required before any new burial-ground could be opened was by sect. 12 of the Act of 17 & 18 Vict. c. 87 (1), and sect. 9 of

chapels of, or on some other conspicuous places within the parishes affected by such representation, one month before such representation is so considered: Provided also, that no such representation shall be made in relation to the burial-ground of any parish until ten days' previous notice of the intention to make such representation shall have been given to the incumbent and the vestry clerk or churchwardens of such parish."

"7. All the provisions contained in the said Act of the last session of Parliament, chapter eighty-five, 'To amend the Laws concerning the Burial of the Dead in the Metropolis,' from section ten to section forty-two (both inclusive) of the said Act, and also in sections forty-four, fifty, fifty-one, and fifty-two of the said Act, shall extend and be applicable to and in respect of any parish not in the metropolis, and for the purpose of providing a burial-ground for any such parish, or otherwise providing for the interment of the bodies of persons who would have had right of interment in the burial-ground of any such parish, and generally in relation to every such burial-ground to be so provided, and the fees and payments to be received in respect of interment or other rights therein and otherwise, as if such sections were re-enacted in this Act, and the words 'in the metropolis,' wherever they occur in such sections, or any of them, were omitted; and section forty-nine of the said Act shall extend to all cemeteries already established, and hereafter to be established, under the authority of Parliament in like manner as to those mentioned in Schedule B. to that Act, and as respects the cemeteries to which such section is hereby extended, the same shall also apply in respect of burials at the expense of any hospital or infirmary in like manner as to burials at the expense of a union or parish: Provided always, that in all cases in which any burial board shall provide a new burial-ground under the said Act of the last session of Parliament, or under this Act, that new burial-ground shall be divided into consecrated and unconsecrated parts in such proportions, and the unconsecrated part thereof shall be allotted in such manner and in such portions as may be sanctioned by one of Her Majesty's principal Secretaries of State; and when any burial board shall, by virtue of section thirty of the said Act build on any burial-ground provided by such board, a chapel for the performance of the burial service according to the rites of the United Church of *England* and *Ireland*, they shall also build, on the portion of such ground set apart for burials otherwise than according to the rites of the said church, such chapel accommodation for the performance of burial service by persons not being members of the said church as may be approved of by one of Her Majesty's Secretaries of State."

(1) 17 & 18 Vict. c. 87, s. 12, is as follows:—

"So much of the said Act of the fifteenth and sixteenth years of Her Majesty as enacts, that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial-ground, or as an addition to a burial-ground under that Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occu-

the Act of 18 & 19 Vict. c. 128 (1), fixed at 100 yards; and by the 21st section of the last-mentioned Act all the above-mentioned Acts were directed to be construed together as one Act.

On the 27th of April, 1872, the Secretary of State for the Home Department, on an application by the Defendants, had the locality inspected, and then signified his approval of the site of the proposed new burial-ground; but in answer to an inquiry by the Plaintiffs' solicitors, a letter was received from the Home Office, stating that the fact of the site of the proposed burial-ground being approved of by the Secretary of State only amounted to the removal of the prohibition to establish a new burial-ground without the sanction of the Secretary of State, and did not interfere with the right of the Plaintiffs to take such steps as they might be advised with a view to prevent the site being used for burial.

The Plaintiffs had not consented to the use of the piece of ground in question for burials.

Mr. *Pearson*, Q.C. (Mr. *Graham Hastings* with him), for the Plaintiffs, after stating the effect of the Burial Acts, was stopped by the Court.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for the Defendants :—

The whole scope of the provisions of the Acts as to the locality

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pier of such dwelling-house,' shall not extend or be applicable to or in respect of any burial-grounds which have been or may be provided under the said Act of the last session and this Act, or either of them, or to or in respect of any addition which has been or may be so provided to any burial-ground; but no ground not already used as or appropriated for a cemetery shall be appropriated under the said Act of the last session and this Act, or either of them, as a burial-ground, or as an addition to a burial-ground, nearer than one hundred yards to any dwelling-house, without such consent as aforesaid."

(1) 18 & 19 Vict. c. 128, s. 9 :—

"So much of the said Act of the fifteenth and sixteenth years of Her Majesty as enacts that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial-ground, or as an addition to a burial-ground under that Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house,' shall be repealed; but no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid."

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of new burying places shews that they are only intended to apply to those places in which all the public have a right of burial, not to places intended for the burial of special classes of persons, such as in this instance those approved of by the Defendants.

The only new burial-grounds referred to in the Act of 15 & 16 Vict. c. 85, are those provided under the Act—that is, by burial boards thereby constituted—which are of necessity for the general use of the inhabitants of a particular place. Amongst other provisions, sect. 7 of the Act of 16 & 17 Vict. c. 134, under which such grounds are directed to be divided into consecrated and unconsecrated parts, distinctly shews this; and the words "under this Act" are continually applied in all the Acts, so as to restrict their application to public burial-grounds provided by burial boards.

Mr. *Pearson*, in reply:—

The Burial Acts have running through them two entirely distinct classes of provisions. One class consists of such clauses as sect. 1 of 16 & 17 Vict. c. 134, by which the Secretary of State is empowered to close existing burial-grounds of any kind whatever. Such clauses are expressed in the most general terms, while those relating to the formation of new burial-grounds by burial boards thereby constituted are expressed in quite different language.

SIR R. MALINS, V.C.:—

This case raises a very important question, namely, whether all burial-grounds are not required to be at least 100 yards from a dwelling-house, or whether the requirement only applies to parochial burial-grounds.

All the Acts which have been referred to form part of one system. The first of them empowered the Secretary of State to close all burial-grounds in *London*, whether intended for the use of churchmen or dissenters, but there was an express provision that the order was not to affect a private burial-ground unless expressly named in it. Then there followed the provision that all future burial-grounds were to be not nearer than 200 yards to any dwelling-house. These provisions were afterwards extended to the whole country, and subsequent consideration led to fixing the limit at 100 yards.

Now the very first of the series of these Acts, 15 & 16 Vict. c. 85, provides that no new burial-places, "whether parochial or non-parochial," shall be opened without the previous approval of the owners of buildings. That provision therefore consequently applies to burial-grounds of all kinds. Then the 25th section provides for the formation of new burial-grounds, and then follows the enactment prohibiting burials within 200 yards, which is again general in words. That therefore is, in my opinion, a general enactment, and I cannot read it in the restricted sense contended for, and say that a public burial-ground is to be subject to restrictions, and not a private ground.

The present limit of 100 yards really depends upon the 12th section of the Act of 17 & 18 Vict. c. 87, though its application is extended by the subsequent Act. I think it is material, in ascertaining the meaning of a particular enactment, to see what are the other provisions of the Act in which it is contained. It is admitted in this case that the usual practice was followed of applying to the Secretary of State to send an inspector down, and that he did so. If the words are restricted in one case they must be restricted in the other also; but the Defendants admit that they require the sanction of the Secretary of State before they can open their new burial-ground; and if they were right in so applying, the Act is a general one, and must be construed generally, and the burthen is thrown upon them of shewing that any particular provision is restricted in its application.

Since, then, burial-grounds in general are included in the provisions of these Acts, I hold that, although the words "under this Act" are used in sect. 9 of 18 & 19 Vict. c. 128, that does not restrict their application to public burying places. I must, therefore, grant the injunction as prayed.

Solicitors: Messrs. *Evans, Foster, & Rutter;* Messrs. *Ridsdale, Craddock, & Ridsdale.*

V.-C. M.
1873
June 23.

ELLWAY *v.* DAVIS.

[1873 E. 29.]

Forest of Dean—Mining Regulations—Free Miners—Grant of Gales—1 & 2 *Vict. c.* 43, *s.* 61.

Where a free miner in the *Forest of Dean* has had three gales or allotments granted to him, and has surrendered one of such gales on the ground that there was not sufficient coal to make the gale worth working, he will be entitled to another gale equally as if the coal in one of the three gales had been exhausted within the language of the 61st section of 1 & 2 Vict. c. 43.

THE Plaintiff, *John Ellway*, was a duly registered free miner in the *Forest of Dean*, in the county of *Gloucester*, within the meaning of the statute 1 & 2 Vict. c. 43, which was passed for regulating the opening and working of mines and quarries in the said *Forest of Dean*, and in that character was entitled to obtain grants of gales or allotments of mines within the forest. The said Act provided that the gaveller or deputy-gaveller for the time being should have power to grant gales to free miners in the order of their applications, according to the rules and regulations made by the *Dean Forest* Mining Commissioners. By the 61st section of the Act it was provided that no free miner, except under the award of the Commissioners thereby appointed, should thereafter be entitled to have more than three gales granted to him at one time, and notwithstanding he might have applied in writing for more than three gales, nor should any free miner have any other gale granted to him by the gaveller or deputy-gaveller until one or more of the said three gales should be exhausted, and notwithstanding the said gale or gales might have been disposed of to any other person or persons whomsoever.

The Defendant, *James Davis*, who was also a registered free miner of the forest, had had since the passing of the Act three gales granted to him by the deputy-gaveller, either alone or jointly with other persons. The first grant was made on the 7th of February, 1843, of a gale in equal parts to *Thomas Jenkins*, *Thomas Phipps*, and the Defendant, and was called the *Old Forester Colliery*. The second grant was made on the 27th of June, 1843,

See also James v Reg 16 L T Eq 502 V C M
for proceedings consequent on the death of Jas. Davis
See also James v Reg 5 Ch D. 153. V C M & C A

to the Defendant alone, and was called the *Speedwell Colliery;* and the third of such grants was made to the Defendant alone, and was called the *Pluckpenny Colliery.* The Plaintiff alleged that none of these three gales had been yet exhausted within the meaning of the 61st section of the said Act.

On the 4th of November, 1868, the Defendant applied to have a fourth gale granted to him of a particular pit, and on the 20th of July, 1871, the Plaintiff applied for a grant of a gale of the same pit, and subject to the right, if any, of the Defendant, the claim of the Plaintiff was prior to that of all other free miners of the forest. The claim, however, of the Defendant, to have such gale granted to him, was alleged by the Plaintiff not to be well-founded, inasmuch as if the Defendant's application were acceded to, he would become the grantee of more than three unexhausted gales at one and the same time, contrary to the provisions of the Act in that behalf. Notwithstanding that the Defendant was not so entitled, the deputy-gaveller had given notice that the Defendant's application would be acceded to. But the Plaintiff had given notice of his objection to the grant, which was thereupon deferred in order that the Plaintiff might have an opportunity of asserting his rights in priority to the Defendant.

The Defendant alleged that he was entitled to the said grant on the ground that in the year 1850 he had surrendered the gale to work the *Speedwell Colliery,* after having tried it and found that there was not sufficient coal to make it worth working, and that he was consequently not now the holder of three unexhausted gales within the meaning of the Act; but the Plaintiff charged that such surrender did not assist the Defendant, inasmuch as the Act referred to an exhaustion of ore, and not an exhaustion of interest of the galee, and in support of this contention the Plaintiff referred to the 15th rule of the *Dean Forest* Mining Commissioners, whereby it was provided that should any galee be minded to give up his gale before it should be worked out or exhausted of its coal, he should only be permitted to do so on condition that he left the horse roads, and other roads and passages which might be requisite for working such coal as might remain in the several veins, in a free and open state and condition, fit for a succeeding galee.

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The Defendant also alleged that as the gale to work the *Old Forester Colliery* was granted to him in conjunction with two other free miners, it was not a gale within the meaning of the 61st section of the Act; but the Plaintiff contended the contrary, and charged that for the purpose of reckoning the number of gales granted to a free miner it was wholly immaterial whether such grant were joint or several.

The bill prayed that it might be declared that the Defendant was not entitled to have any further gale granted to him by the gaveller or deputy-gaveller of the forest until one or more of the said three gales already granted to him should have been worked out or exhausted of its ore; and that the Defendant might be restrained by injunction from prosecuting the application made by him on the 4th of November, 1868, or from accepting any grant from the said gaveller or deputy-gaveller in pursuance of such application.

Mr. *Cotton*, Q.C., and Mr. *Cookson*, in support of the motion:—

The only question in this case is, whether the Defendant, who has had three gales granted to him in the forest, is entitled to a fourth gale before he has completely worked out one of the three gales. We contend that, under the words of the 61st section of the Act 1 & 2 Vict. c. 43, the mine must be exhausted; and this cannot be the case until the mine has been worked and all the coal abstracted. The Defendant has not worked the mine at all, but, finding that it would not pay for the working, he has surrendered it without working. The meaning of the Act must be that each free miner is to select such pit as he thinks best suited to him, and, having made his choice, must be bound by the grant, and cannot be allowed to give it up and select another until the first pit is exhausted; that is, he cannot have a fourth gale until one or other of the three gales granted to him shall have been worked out; and it can make no difference that one of the gales was taken by the Defendant in conjunction with other persons.

Mr. *Glasse*, Q.C., and Mr. *J. G. Wood*, for the Defendant, were not called upon to address the Court.

SIR R. MALINS, V.C.:—

The rights enjoyed by the free miners of the *Forest of Dean* are well understood. They must have been born in the parish; they must be twenty-one years of age, and must have lived for a certain period within the hundred. When all these circumstances concur, they are entitled to apply for a grant of gales, and the grants are made to free miners according to priority of application. These privileges are very valuable, and are sometimes sold by the grantees to companies who, by reason of the capital they possess, are better able to work them. But, in order that there shall be a fair distribution of the grants, it is provided by the 61st section of the Act that one man shall not engross too much of the land, and shall not be entitled to have more than three gales granted to him at one time, and should not have any other gale granted to him until one or more of the said three gales shall be exhausted.

Now, the question arises between the Defendant, *James Davis*, who had granted to him three gales in the year 1843, and the Plaintiff, *John Ellway*, who is a free miner, and is entitled to priority over all other applicants except the Defendant—that is, in case the Defendant is not entitled to a fourth gale. It appears that in 1850 the Defendant discovered that one of the gales which had been granted to him was not workable so as to yield a profit, and he consequently gave notice to the deputy-gaveller that he would surrender the gale, as it was useless for the purpose of working. Then, having surrendered one of the three gales in 1850, the question is, whether he comes within the words of the 61st section. It is said he cannot have a fourth gale because he is the grantee of three gales; but he contends, on the other hand, that, as he surrendered one of the gales in 1850, he is the grantee of only two gales. The Plaintiff says, "You cannot stand in my way, because you have had three gales granted to you, none of which have been exhausted." Now, has he or not exhausted one of the three mines within the meaning of the Act? In my opinion, exhausting does not mean working out every hundredweight of coal; but a mine is exhausted when there is not enough coal in it to make it worth working. The Defendant says he tried the mine, and took steps to work it by means of the

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Speedwell Coal Company, and there was not coal enough to make it worth working. That is, in my opinion, bringing the case within the meaning of the word "exhausted" as used in the Act; and I think it a very material point in the Defendant's favour that the deputy-gaveller accepted the surrender, which he ought not to have done unless he was satisfied that the coal was worthless, or could not be worked at a profit. Having thus surrendered the grant, and the surrender having been accepted, I think the Defendant is at liberty to apply to have another gale granted to him on the ground that he is not now the holder of three gales. The motion therefore fails, and must be refused.

Solicitors for the Plaintiff: Messrs. *Waterhouse & Winterbotham*.
Solicitors for the Defendant: Messrs. *Peacock & Goddard*.

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FEATHERSTONE *v.* COOKE.

[1872 F. 14.]

TRADE AUXILIARY COMPANY *v.* VICKERS.

[1871 T. 160.]

Public Company—Managing Body—Receiver—Jurisdiction—Limits of the Interference of the Court.

10 Ch 607

The existence of disputes between different members of the governing body of a company which prevent its affairs being carried on properly, is a ground for the intervention of the Court by injunction and receiver to protect the property of the company, but the interference of the Court will be continued only until a governing body is duly appointed.

FEATHERSTONE *v.* COOKE.

THIS suit arose out of certain disputes as to the management of a company of limited liability formed for the purpose of working a slate quarry at *Wiveliscombe* in *Somersetshire*.

The company was formed by the registration of a memorandum of association in the year 1859, under the Joint Stock Companies Acts of 1856 and 1857. There were no articles of association.

The capital at first consisted of 4000 shares of £1 each; but it was afterwards increased in 1866 by the issue of 2685 additional shares of £1 each, on which only 8*s.* per share were paid.

Between the years 1864 and 1869 there were only two directors, *Robert Cooke* and *Henry Bellew*, both of whom were originally Defendants to the bill. Of these *Cooke* acted as chairman. The company during this period was not very prosperous, and some dissatisfaction was expressed at the management, and on the 21st of August, 1869, *Bellew* retired, and *William Featherstone* and *George Henry Bond*, two of the Plaintiffs, were associated as directors with *Cooke*, who continued to act as chairman.

So matters went on till the month of October, 1871, and in the view of the Plaintiffs the position of the company was much improved during that period. About that time, however, disputes took place between the three directors as to the mode of carrying on the business of the company, in which *Cooke* took one view in opposition to *Featherstone* and *Bond*.

One of the meetings of the board of directors took place on the 9th of October, 1871, at which all three were present, but they were unable to agree on any definite course. On the 13th of October *Cooke* sent notices to his two co-directors of another meeting to be held on the 16th of October. They did not attend, being, as they stated in their evidence, prevented by other engagements from doing so; and they requested that another day might be fixed. This was the only meeting of the board which they had failed to attend.

Cooke, however, on the 20th of October, issued another notice, signed by himself and two other shareholders, calling upon the directors to convene an extraordinary meeting of the company, to be held on the 27th of October, to pass the following resolutions:—

"1. That inasmuch as the directors of the said company do not attend the meetings called by the chairman, the salary allowed to the directors be at once discontinued, and no longer payable either to the chairman or other directors of the company.

"2. That Mr. *Henry Bellew* and Mr. *John Gidley* be appointed directors of the company in the room of Mr. *William Featherstone* and Mr. *George Henry Bond*."

The Plaintiffs *Featherstone* and *Bond* found that this notice was

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informal in various particulars, and wrote to the parties who had signed it informing them of the fact, whereupon they issued another notice with the same object, but corrected in that particular as to which the errors had been pointed out.

The disputes between the parties continued, and rival meetings of the board of directors and of the company were held, at which each party endeavoured to exclude the other from the government of the company, one of the results being that the works of the company were stopped, and water began to accumulate in the quarry.

This state of things continued till the 23rd of January, 1872, when the Plaintiffs filed the present bill, by which they sought an injunction to restrain the Defendants, who were *Cooke* and the parties supporting him, and the company, from preventing *Featherstone* and *Bond* from acting in the management of the company till after a meeting of the shareholders could be held. The day for holding the annual meeting, at which the directors would have to retire, was in February.

An injunction was granted *ex parte* on the same 23rd of January, 1872, and on the 5th of February, 1872, the Defendants gave notice of motion for the 15th of February to dissolve the injunction so granted. The motion, however, was not heard on that day, and on the 28th of February following a general meeting of the company was held, the result of which was that the party of the Defendants acquired the entire management, and the party supporting the Plaintiffs were no longer represented on the board.

On the 7th of March, 1872, the motion came on and the injunction was dissolved, on the ground that a proper governing body had been formed and the interference of the Court was no longer required.

The Plaintiffs now moved that on payment by the Defendants, other than the company, of the costs of the suit, all further proceedings in the suit might be stayed.

Mr. *Cooke* had died shortly before the present motion was heard.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, Q.C., for the Plaintiffs.

Mr. *Pearson*, Q.C., and Mr. *G. Hastings*, for the Defendants.

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SIR R. MALINS, V.C., after stating the facts, continued :—

This bill was filed on the 23rd of January, 1872, and in February the regular meeting would have been held. It has been asked with considerable force why a bill should be filed on the 23rd of January, when in twelve days afterwards the annual meeting ought to have been held, which would have removed these directors, if the meeting were dissatisfied, and appointed others. That is a very strong circumstance, in one sense, in Mr. *Cooke's* favour. But, on the other hand, it is a very strong circumstance against him that he thought proper to originate this litigation, because the notice given by Mr. *Cooke* in the month of October, which was an insult to these gentlemen, was the declaration of war. He also might have waited till the month of February. The mine was making no profit, and if it has made any profit since I am satisfied that it has been by the efforts of the Plaintiffs. Then I have to see what was the justification for filing this bill. I consider that there was much more justification for it on the principles of this Court as to interference with the internal management of companies than for issuing the notices. With regard to private partnerships, nothing is of more frequent occurrence than the quarrels of partners. If parties quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the Court to interfere by injunction, and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this Court to interfere, and it will do so. I have referred already to the case of the *Trade Auxiliary Company*, where there being quarrels between the directors, in which one set being in possession of the office shut the doors against the others, and those who were excluded employed Irish labourers to ram the door down, and when they got in tried to exclude the others. I interfered, I believe, with great advantage, by appointing a receiver and manager, excluding them all from any voice in the matter, until a meeting had been held and appointed a governing

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body, and when that was done I discharged the receiver, and left the management of the property, as it is at this moment I believe, in the hands of directors selected by the body of shareholders.

In the present case, from the month of October down to the month of February, that state of things existed in which it was absolutely impossible that the affairs of this company could be conducted with advantage. One director was pulling one way and two directors the other way. It was perfectly within the jurisdiction of this Court, I think, to interfere as I did by the injunction which I granted, and to prevent the continuance of that state of things. It might have been as well, considering the very near approach of the holding of the annual meeting, if the Plaintiffs had refrained from applying at all after waiting, as they did, from October to January; but I have not the slightest hesitation in coming to the conclusion that the improper conduct of Mr. *Cooke* in the month of October was the cause of this litigation. I think I should only be doing justice if I made Mr. *Cooke*, if he were alive, pay the costs of this litigation. But I cannot make any order against him.

Then, considering that the Defendants have sided throughout with Mr. *Cooke*, I cannot throw the costs on the Plaintiffs. It might have been better if they had waited till the annual meeting was held. Still, I cannot say that men who are thus treated are without excuse in coming for protection here.

Then, in order to determine this question as to the costs, I must not only look to the origin of the dispute, but consider how it has been conducted. With regard to personal charges, I may say there are no personal charges against Mr. *Cooke*, except one, and I think it had better have been omitted from the bill. However, if he had felt offended at all a simple affidavit of half a page would have set that matter right. [His Honour then commented on the amount of the evidence filed which he considered was excessive, and continued:—]

Therefore, the conclusion I come to upon the whole is, that the Plaintiffs have been wrong in filing the bill too late, because I think they might very well have stayed their hand and not filed a bill at all. On the other hand, considering the way they were

treated, and the mass of affidavits filed, I come to the conclusion that I shall stay all further proceedings in this cause, and give no costs on either side.

Solicitors: Messrs. *Kimber & Ellis;* Messrs. *Farrer, French, & Tatham.*

July 1, 2. TRADE AUXILIARY COMPANY *v.* VICKERS.

THIS was a suit instituted in the name of the *Trade Auxiliary Company* and several of the shareholders, including *William Columban KcKenna*, one of the directors, against *Thomas Vickers*, another director, *Richard Hartley*, who was then the sub-manager and also held one share, the company, and *Charles Senior*, who was trustee of some property for the company.

The company was registered on the 2nd of May, 1866, and, by an indenture of the 9th of December, 1867, took over the business of a firm of *Stubbs & Co.*

James Hole, one of the Plaintiffs, was appointed manager, and, according to the allegations of the bill, he appointed the Defendant *Hartley* to be sub-manager for a period which expired on the 31st of October, 1870. He however allowed him to continue sub-manager till the 8th of December, 1870, on which day his own term of office also expired, when he gave him notice that his term of office had expired. He at the same time gave notice to the directors that his term of office had expired.

The directors had been *McKenna, Vickers,* and a Mr. *Chadwick,* who had sold and transferred his shares to *McKenna. Vickers* had also agreed to sell his shares to *McKenna,* but he insisted that both he and *Chadwick,* being still on the register, were qualified to act as directors; and as to himself, he disputed the effect of the alleged agreement for sale.

The Plaintiff *William Columban McKenna* proceeded to the offices of the company, but *Vickers* and *Hartley,* who were in possession, refused to withdraw, and they ultimately closed the office doors against him. Upon this *McKenna,* or those who sided with him, obtained the aid of some Irish labourers, who broke open the office doors with crowbars, and forced the office open.

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The bill alleged that a requisition had been signed by a sufficient number of the shareholders taking the part of the Plaintiffs to hold an extraordinary meeting of the company to constitute a proper governing body, but that *Vickers* had, on account of some informality, not called the meeting.

The bill was filed on the 15th of November, 1870, and the Plaintiffs soon afterwards moved for the appointment of a receiver till a proper board of directors could be constituted.

The motion was very hotly contested both before the Vice-Chancellor and on appeal before the Lords Justices, but ultimately an order was made appointing two receivers until such time as a meeting could be held to constitute a proper governing body for the company.

Before the meeting could be held questions were raised as to whether the register of shareholders was in a proper state, and by an order of the Lords Justices, dated the 28th of April, 1871, certain alterations were directed to be made in it preparatory to a meeting of the company, and these alterations were at last made in the presence of the Vice-Chancellor's Chief Clerk. The register having been put into a proper state, an extraordinary meeting of the company was summoned and held on the 1st of June, 1871, and resolutions were passed thereat by which a board of directors was appointed, consisting entirely of those who took the same view of the position of the company as the Plaintiffs.

A proper governing body having been thus constituted, the Plaintiffs offered to provide for the costs of the Defendants, and to bring the suit to an end. The Defendants, however, declined the offer, and the Plaintiffs gave notice of a motion to discharge the receiver. The motion, of which notice was originally given for the 20th of June, 1871, stood over from time to time to enable the parties to file further evidence, but on the 27th of July, 1871, the order was refused by the Vice-Chancellor, on account of a technical objection made by the Defendants.

In consequence of another application to the Court one of the receivers resigned, and the other receiver was continued in the management alone. The Defendants appealed from this order, but the Lords Justices dismissed the appeal. They however suggested that it was desirable, on account of some possible irregu-

larity in the summoning of the previous meeting, to have a fresh meeting of the company called. Such meeting was accordingly held, and resulted in favour of the party supported by the Plaintiffs.

On the 18th of November, 1871, the Vice-Chancellor made an order discharging the receiver, and this order was affirmed by the Lords Justices in the month of February following.

Nothing then remained except the costs of the suit, and the question whether the Defendants were liable to an inquiry as to damages in respect of the extra cost of managing the business of the company under the receivers.

Mr. *Glasse*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiffs.

Mr. *Pearson*, Q.C., and Mr. *Romer*, for the Defendants *Vickers* and *Hartley*.

Mr. *Cotton*, Q.C., and Mr. *Bevir*, for the Defendant *Senior*.

SIR R. MALINS, V.C.:—

This case has occupied a great deal of time, but I am bound to say not so much as I had anticipated from my previous experience of the suit. It is the second case I have had within a week which raises points as to which I think it is of very great importance to the public that there should be no misunderstanding, relating to the mode in which the business of joint stock companies should be conducted. This case, above all others, strongly illustrates the danger of departing from principles which ought to be well settled. Those principles are, I apprehend, what I laid down in *Featherstone* v. *Cooke*, that the Court will not interfere with the internal affairs of joint stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the Court will interfere, but only for a limited time, and to as small an extent as possible.

In the present case the bill was filed on the 15th of December, 1870, and on a motion being made on the 22nd of December, I

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appointed a receiver for a limited period There was then a dispute as to the persons constituting the governing body. It is said that there were then three directors, of whom *Chadwick* and *Vickers* were on the side of the Defendants, and only one, *McKenna*, on that of the Plaintiffs. But it is plain upon the evidence that *Chadwick* had sold his shares and received the purchase-money, and had executed a transfer to *McKenna*. But *Vickers* insisted that *Chadwick* was a director with him, and then with his aid sought to overpower *McKenna*.

Now I am clearly of opinion that *Chadwick*, having sold his shares, and received the purchase-money, and executed a transfer, had no business whatever to continue to act as a director of the company. Though he might be on the register it is perfectly clear that, by the rules of this as of every other company, he was not a person continuing to hold shares for his own benefit.

This led to violent proceedings on the part of *McKenna* and his party, who on the 15th of December forced open the doors of the office of the company when *Vickers* and *Hartley* were in possession. The parties were, in consequence, taken before the Lord Mayor on the 16th of December, but the matter was settled on the assurance being given that the violence would not be repeated. A motion was then made before me on the 22nd of December, and I was then satisfied that a state of violence and disorganization existed in the company which made it absolutely necessary to interfere. Accordingly I made an order referring it to Chambers, to appoint a receiver, not generally but for a limited period, that was, till the register should be set right. The state of the register was disputed not only as regarded the shares of *Chadwick;* for it was also contended that *Vickers* had agreed to sell his shares for £700, though he had not received the purchase-money.

I then selected a nominee of each side—Mr. *Ramsey* and Mr. *Price*—and appointed them for two months only, that is to say, to the 1st of March. I fixed that date because I thought it would give time to correct the register and to have a meeting held to appoint directors. Various proceedings took place before me in Chambers. I found that a longer time than I had expected was required, and I renewed the appointment for a month or two months longer. During that time the register was set right,

and a meeting of the shareholders as then ascertained was held on the 1st of June, 1871. The result of the meeting was that Mr. *Chadwick* and Mr. *Vickers* were removed from the directorship, and Mr. *McKenna*, Mr. *Pickering*, and Mr. *Hole*, were, in my opinion, duly, legally, and properly appointed directors of this company.

Then the very object for which I had interfered was accomplished, when the governing body was appointed on the 1st of June. I am of opinion that there was reason enough for the existence of the suit from its commencement on account of the confusion into which the affairs of the company had been brought, but that the whole object of the suit was accomplished when the governing body was appointed.

[His Honour then went in detail through all the subsequent proceedings in the case and expressed his opinion that the offer made by the Plaintiffs on the 14th of June, to pay the costs of the Defendant and bring the suit to an end, ought to have been accepted, and continued:—]

Therefore, Mr. *Glasse*, at my suggestion, being satisfied to ask for no costs up to the 1st of June, 1871, there will be no costs on either side till that date, when the governing body was constituted, and all the costs after that date must be paid by the Defendants *Vickers* and *Hartley*.

The date from which the costs of the receiver were to be paid by the Defendants was ultimately fixed at the 20th of June, which was the day for which notice of motion to remove them was originally given.

The costs of the Defendant *Senior* were to be paid by the Plaintiffs, and recovered over from the other Defendants.

Solicitors: Mr. *John Hales;* Messrs. *Hewitt & Alexander;* Mr. *Rushworth.*

V.-C. M.
1873
July 15.

DAVIES *v.* FOWLER.

[1871 D. 28.]

Will—Appointment by Married Woman—Specific Legacy—Proportionate Part of a Sum of Stock—Probate Duty—23 Vict. c. 15.

A married woman who had a power of appointment over a fund invested in Government stock, by her will gave legacies of specified sums of the fund:—

Held, that the legacies were specific, and carried interest from her death.

The legacies so given did not exhaust the fund, and there was a residuary gift of the fund after payment thereout of the testatrix's debts, funeral and testamentary expenses:—

Held, that though the disposition of the residue of the fund was also specific, the words of the will threw the payment of the whole of the probate duty upon the residue.

SAMUEL SALTER, by his will, dated the 23rd of December, 1847, gave to trustees a sum of £40,000 £3¼ per cent. stock, upon trust to continue the same invested in the same or some other Government stocks or funds, or such other securities as were therein mentioned, and to pay the dividends thereof to his wife, *Mary Salter*, during her life, and after her death upon trust to assign or transfer the said sum of £40,000 £3¼ per cent. stock, or any part thereof, to any person or persons, and under and subject to such conditions and restrictions, charges and limitations, at such time or times, and in such manner or form, as the said *Mary Salter* should by any deed or deeds, or by her last will and testament in writing, or any codicil or codicils thereto, direct or appoint, give or dispose of the same.

The testator died on the 9th of October, 1850. His widow, *Mary Salter*, in 1858, married *William Rees*, and by the settlement on her second marriage power was reserved to her to exercise the power of appointment during coverture as if she were sole.

Mrs. *Rees* made appointments by deed, which reduced the amount of the stock by about £10,000, and by her will she confirmed these appointments, and she appointed the residue to trustees, and directed the application thereof in the following words: "All the rest, residue, and remainder of the said sum

of £40,000 £3 per Cent. Annuities, or the stocks or funds which may at the time of my death represent such annuities and trust funds, which said sum of annuities, stocks, funds, and securities are hereinafter referred to under the expression 'trust funds,' upon trust to pay or transfer £100 of such trust funds for my nephew *Philip Henry Dicker*."

Then followed several other legacies, given in exactly the same terms, and always expressed to be so much of "such trust funds." These legacies did not exhaust the fund, and there followed a residuary clause in the following words: "And in further exercise of the said power of appointment so given to me by the will of my late husband, and the power reserved to me by the said deed of settlement made previously to my marriage with my present husband, and of every other power enabling me in this behalf, I give all the residue of the said sum of £40,000 New £3 per Cent. Annuities not hereinbefore disposed of, or the stocks, funds, and securities which shall at the time of my death represent such trust funds, and all the residue of my other estates and effects whatsoever and wheresoever, to the said *William Fowler* and *George Hicks Davies*, their executors, administrators, and assigns, upon trust to sell such portion of the said trust funds as shall remain undisposed of, and to divide the proceeds of such sale, after payment thereout of all debts which may be due from me at my decease and my funeral and testamentary expenses, and to divide the residue of my estate and effects between my nephews and nieces following."

The stock in question remained in the same state of investment, but the interest was reduced from £3¼ per cent. to £3 per cent.

The testatrix died on the 22nd of February, 1870. The will had no operation except as an appointment of the trust funds.

The suit, which was instituted by two of the residuary legatees against the trustees of the will, now came on for further consideration.

It had, however, come before the Court on the 27th of July, 1872, when an order was made, on an application by one of the legatees, for payment of his legacy, with interest, to run from a year after the testatrix's death; but it did not appear that the point now argued was fully gone into on that occasion.

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Mr. *Cotton*, Q.C., and Mr. *E. S. Ford*, for the Plaintiffs:—

Unless these legacies can be made out to be specific, the ordinary rule must prevail, and the legatees will only be entitled to interest commencing from a year after the death of the testatrix. This rule applies to property appointed by a married woman under a power: *Tatham* v. *Drummond* (1). It is true that in one sense appointments by married women are of necessity specific, being gifts out of specific funds; but *Tatham* v. *Drummond* shews that they do not, in consequence, bear interest from the death. The gifts here cannot be specific for all purposes, or they would have failed if there had been a change of investment. The question may be tested by considering whether there could be any ademption, which there clearly could not be.

If, however, the legacies are specific, they must bear their proportion of the probate duty, in accordance with the Act of 23 Vict. c. 15, ss. 4 and 5.

Moreover, the question is not now open to be argued, having been concluded by the order of the 27th of July, 1872.

Mr. *Charles Hall*, for some of the legatees:—

The question whether these are specific or general legacies cannot be determined upon the consideration of whether at the death of the testatrix, or when the will was made, there was a fund to answer them. There may even be a specific legacy of that which does not exist at the date of the will, and supposing these to be specific legacies they would have failed if there had been a change of investment between the will and the death. The legacies cannot be specific for one purpose and not for another. The Plaintiffs wish to treat them as specific for the purpose of making them gifts of stock, not of money, and if so, all the other results of their being specific follow. *Tatham* v. *Drummond* is really in favour of this view.

Then the question of probate duty is really decided by the testatrix herself. She has said that the residue is to bear all testamentary expenses.

On the point as to whether the question was concluded on the

(1) 2 H. & M. 262.

previous occasion, the legatees were at all events entitled to what was then given them.

Mr. *Jackson*, Q.C., and Mr. *Charles Stewart*, for other legatees:—

Tatham v. *Drummond* (1) is only a decision upon special circumstances. If these are gifts of so much stock, they are specific: *Mullins* v. *Smith* (2); *Hosking* v. *Nicholls* (3). If not specific then they are gifts of so much money.

As to the question of probate duty, the Act referred to is fiscal, and cannot affect the construction of the will, by which the charge is thrown on the residue.

Mr. *Cotton*, in reply:—

This case is identical in principle with *Tatham* v. *Drummond*. The test as to whether these legacies are specific or general, is whether they would fail if the investment were changed, and the testatrix has shewn that she did not intend this result. The consequence is that they are general. This is a question to be determined from the context of the will: *Auther* v. *Auther* (4); *Kirby* v. *Potter* (5). Everything depends upon whether a gift is part of a particular fund or out of a particular fund: *Hosking* v. *Nicholls*.

SIR R. MALINS, V.C.:—

The question is, whether the testatrix has meted out the £40,000 stock, or the sum which remained after her previous appointments amongst the various legatees, as parts of the stock, or whether she has given general legacies. If she has meted out or divided the stock amongst the legatees in certain proportions, the legacies are specific, and must be appropriated as from the death of the testatrix, and carry the dividends from that time. If, on the other hand, the property is to be converted into money, and out of the produce of stock the legacies are to be provided, then they are general legacies, and do not carry interest until the expiration of one year from the death of the testatrix.

The question, then, is, whether the testatrix has or has not meted

(1) 2 H. & M. 262.
(2) 1 Dr. & Sm. 204.
(3) 1 Y. & C. Ch. 478.
(4) 13 Sim. 422.
(5) 4 Ves. 748.

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out the stock amongst the legatees. That must be determined by the words of the will:—[His Honour then read the words of the will, remarking upon the fact that the testatrix described the sum of stock as "trust funds," and in the gift of each legacy used the expression "part of the trust funds," and continued:—]

My understanding of the will is that it means, "I have divided and meted out amongst the legatees parts of the said trust funds."

Now with regard to specific legacies, the doctrines of this Court are very minute, and very refined distinctions are drawn, and no doubt the general inclination is to treat a legacy as general rather than as specific. This construction is generally in favour of the legatees, because although a specific legatee has many advantages he is exposed to many perils. He has the advantage of taking the very thing that is given, although the general assets may be insufficient, and he has the advantage of taking the dividends or interest from the death of the testator. But, on the other hand, he is exposed to the very great peril of ademption, but that is anxiously provided for by the testatrix by giving the residue of the said sum of £40,000 new £3 per Cent. Annuities, or the stocks, funds, and securities which should at the time of her death represent such annuities.

Now that falls exactly within the distinction drawn by Vice-Chancellor *Knight Bruce* in the case of *Hosking* v. *Nicholls* (1), and is also to be found in *Mullins* v. *Smith* (2), which were both cited by Mr. *Jackson*. The case of *Hosking* v. *Nicholls* is an excellent illustration of it. The testator by his will gave to trustees the sum of £4000 capital stock in the £3 per Cent. Consolidated Bank Annuities, or in whatever of the Government funds the same should be found invested, upon trust to assign and transfer the capital stock of £4000 unto and amongst the persons mentioned. The trustees had treated the legacy as a general one, so as to carry the dividends or interest only from the expiration of a year, and they had paid the first year's dividends to their residuary legatees, but it was held to be a specific legacy. The Vice-Chancellor said (3), "If the testator had meant to give a general legacy he would probably have said no more than that he gave £4000 Consols. But he does more than that. He bequeaths

(1) 1 Y. & C. Ch. 478. (2) 1 Dr. & Sm. 204.
(3) 1 Y. & C. Ch. 480.

£4000 stock in the £3 per Cent. Consols, or in whatever of the Government funds the same shall be found invested. The question is whether this legacy is merely demonstrative or specific. It has always been held that a legacy of stock out of stock is specific; being the gift of part of a specific fund. Here the testator intimates an intention that the stock shall be taken, not out of his general personal estate, but out of whatever Government fund he may possess. Therefore only Government funds are to be resorted to. It is not a bequest of money out of stock, but stock out of stock. It is a specific bequest, and the executor must pay the dividends from the death of the testator." So here the gift is of the Consols, or the stocks and funds which might at the time of the death represent such annuities.

On this question of whether a legacy is or is not specific the refinements are very great. There is, for instance, the case of *Kirby* v. *Potter* (1), where the testator gave a legacy of £100 "out of my Reduced Bank Annuities," and it was held to be pecuniary or general. The Master of the Rolls (Lord *Alvanley*), in giving judgment, said: "If the legacy given by the codicil had been 'of my stock,' or 'in my stock,' or 'part of my stock,' I should have held it clearly a specific gift of an aliquot part of the stock." But that is the very case which has occurred here, for the testatrix speaks of "£100 of such trust fund."

Therefore this case falls within the very definition, and in my opinion it is a specific legacy. It is a meting out or dividing amongst the legatees of the very thing over which the testatrix had a power of appointment. In fact, it is very probable that such was her intention. She knew perfectly well that she was tenant for life in possession of £30,000 stock, and that that was the fund she had to divide. Nothing can be more natural, therefore, than that she should proceed to divide it amongst her legatees in such proportions as she thought fit, and accordingly she does divide it amongst them in a manner which, I repeat, I can only read as "parts of the trust fund." The result, therefore, is, that in my opinion the legacies are specific, and the fund is payable as from the death of the testatrix amongst the legatees in the proportions in which it is divided.

(1) 4 Ves. 748, 750.

V.-C. M. 1873 DAVIES v. FOWLER.

Then, the previous legacies not having exhausted the fund, she gives what remains in the form of a residue; therefore, although it is given in the form of residue, it is just as specific as the other.

I may mention the case of *Newbold* v. *Roadknight* (1), where there was a gift of a sum of money to one to be paid out of the produce of a real estate directed to be sold, followed by a gift to others of the residue of that produce; and it was held to be substantially a gift of the whole estate, and not a gift of legacies collaterally charged upon the estate; so that these gifts were adeemed if the testator sold the estate in his lifetime. Therefore the gift of the residue is also specific, and if the will had stopped there, I should have held, in conformity with Mr. *Cotton's* argument, that there must be a rateable contribution to the probate duty, which, unfortunately for the residuary legatees, he says, casts a burden upon them which is not cast upon the others, because the gift is of "the proceeds of such sale after payment thereout of all debts which may be due from me at my decease, and my funeral and testamentary expenses, and to divide the residue of my estates and effects between my nephews and nieces." That is, the residue which remains after paying the funeral and testamentary expenses, the latter of which include the probate duty.

Now I have only one further observation to make. It is said that on the 27th of July last year I decided this point in opposition to my present decision. If so, it would still be open to me to decide it differently. But I did not intend to decide it, because the application there was by one legatee who wanted his money, and it being admitted that the money was ready, all I decided was that the legatee should take his legacy, with interest commencing from one year from the death of the testatrix. That was the least he could be entitled to, and therefore my giving him that sum was without prejudice to any question. The case then occupied a very short time; it has occupied a much longer time to-day, but not more than was required by its difficulties. I should not, in the absence of the parties interested, have decided that these legacies were not specific.

Solicitors: Messrs. *Merriman, Powell, & Co.*; Messrs. *Walker, Sons, & Field*; Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) 1 Russ. & My. 677.

In re HEMSLEY'S SETTLED ESTATES.

V.-C. M.
1873
June 27.

Practice—Petition—Settled Estates Act—Misdescription—Error in describing the Settlor.

In the advertisements issued in pursuance of sect. 20 of the *Leases and Sales of Settled Estates Act*, a settlor was described as of "*Gotham*, in the county of *Middlesex*," instead of the county of *Nottingham*. The Court considered that, as all parties interested under the settlement were represented on the application, the advertisements might be considered sufficient.

THIS was a Petition under the *Leases and Sales of Settled Estates Act*, asking for the sanction of the Court to a sale of certain real estate which was devised by the will of *Henry Hemsley*, of *Gotham*, in the county of *Nottingham*, upon trust to pay out of the income an annuity to his widow during widowhood, and subject thereto upon trust for his daughter, Mrs. *Julia Hunt*, for life for her separate use, and after her death upon trust to sell the property and divide the proceeds amongst Mrs. *Hunt's* children as therein mentioned.

The widow was dead, and the daughter, her husband, and all her children, some of whom were infants, and the trustees, were Petitioners.

In the advertisements issued in pursuance of the 20th section of the Act and under Cons. Ord. XLI., rules 14 and 15, the testator was described as "*Henry Hemsley*, of *Gotham*, in the county of *Middlesex*," instead of "in the county of *Nottingham*." The estate itself was, however, correctly described.

Mr. *Bevir*, for the Petitioners:—

The mistake is one which cannot cause any real difficulty, and is not of greater importance than those in *In re Bicknell's Settled Estates* (1), and *In re Whiteley's Settled Estates* (2).

SIR R. MALINS, V.C.:—

I think the misdescription cannot possibly deceive any one.

(1) Law Rep. 14 Eq. 467. (2) Law Rep. 8 Eq. 574.

V.-C. M. 1873 *In re* HEMSLEY'S SETTLED ESTATES.

You have Mrs. *Hunt* and all the parties interested who are *sui juris* Petitioners, and they are consequently aware of the facts. There can really be no mistake about the matter. I think that, considering that all the parties who have any interest in the property are before the Court, you may take the order.

Solicitors: Messrs. *Peacock & Goddard.*

V.-C. M. 1873 *July* 3.

McKEWAN *v.* SANDERSON.

[1872 M. 198.]

Practice—Plea overruled—Leave to answer—Second Plea with Answer.

Where a plea has been overruled, with leave to put in an answer, the Defendant cannot file a second plea coupled with an answer without special leave of the Court.

THIS was a bill filed by the public officer of the *London and County Banking Company*, praying a declaration that the Defendant was liable to pay to the bank certain sums alleged to be due upon bills of exchange.

The Defendant pleaded to the whole bill, and the Vice-Chancellor, on the 28th of January, 1873, overruled the plea, principally on the ground that there was no averment in the plea of any pending proceedings in bankruptcy: see report of *McKewan* v. *Sanderson* (1). Leave was then given to the Defendant to put in his answer within two months.

The Defendant subsequently applied in Chambers for further time to answer, and the Chief Clerk made the usual order, allowing the Defendant further time "to plead, answer, or demur, not demurring alone."

The Defendant then put in a second plea coupled with an answer, the plea being in the same words as the former plea, except that it contained an averment that proceedings were pending in bankruptcy.

The Plaintiff now moved that the plea might be taken off the

(1) Law Rep. 15 Eq. 229.

file for irregularity, and that the Defendant might be ordered to pay the costs.

Mr. *Cotton*, Q.C., and Mr. *Waller*, for the Plaintiff:—

It is the settled rule of this Court that a Defendant cannot put in a second plea after the first has been overruled, without special leave of the Court. This has been decided in various cases collected in *Morgan's* Chancery Practice (1). In the case of *Jackson* v. *Ward* (2) a plea was overruled, but special leave was given to file another plea. In *Rowley* v. *Eccles* (3) it was decided that a Defendant could not plead after a demurrer had been overruled. This was on the ground that there cannot be two dilatories put in to a bill in equity before filing the answer. The effect of allowing two pleas would be to cause vexatious delay, for the second plea must be set down for argument, and not till that is overruled would the Plaintiff be able to obtain an answer. Moreover, if two pleas are allowed, why not three or more? This would be a grievous injustice.

Mr. *Glasse*, Q.C., and Mr. *Cottrell*, for the Defendant:—

Whatever rule there may be against putting in a second plea, there is nothing to prevent a Defendant from putting in a plea and answer. The Defendant has leave to answer, and he may combine a plea with his answer. A plea coupled with an answer is not a plea coming within any restriction against a second plea. Not that we admit such a rule to exist, for there is no distinct decision that a second plea cannot be put in. In *Hunter* v. *Nockolds* (4) the Lord Chancellor said, "There is no doubt that a party who obtains an order for time to answer is at liberty to plead. . . . The reason is that the word answer embraces every defence which it is competent to a Defendant to make, except demurring alone." In that case the plea was allowed after time for answering had twice been extended. Here we obtained further time "to plead, answer, or demur, not demurring alone;" and this of itself would give us leave to file a second plea. The objection

(1) Last Ed. pp. 442, 446; 3rd Ed. p. 423.
(2) 18 W. R. 973. WN(1870) 181.
(3) 1 S. & S. 511.
(4) 2 Ph. 540, 543.

V.-C. M. 1873 McKewan v. Sanderson.

now raised is solely on the ground of irregularity, and on that the case must be decided; but the Plaintiff has waived the irregularity by not moving, as he should have done within three weeks, to take the plea off the file: *Herrett* v. *Reynolds* (1).

Sir R. Malins, V.C.:—

I am of opinion that this motion ought to be acceded to, and with costs. It is important that the rules of the Court should be strictly adhered to, and I think there is no rule more firmly settled than that a Defendant having put in one plea, and that plea having been overruled, cannot put in another plea without special leave of the Court. This was a bill filed by the public officer of the *London and County Banking Company*, seeking relief against the Defendant in respect of matters arising out of certain bill transactions. The Defendant put in a plea to the whole bill, and the plea was overruled in January last with costs, and on the application of the Defendant I gave him two months' time to answer. It is said that an application was afterwards made to the Chief Clerk for further time, and the usual order was made in Chambers for leave to "plead, answer, or demur, not demurring alone." I do not think, if the attention of the Chief Clerk had been drawn to the fact that I had already overruled a plea put in by the Defendant, that he would have made an order in these terms. It is true that in *Hunter* v. *Nockolds* (2) it was decided that a Defendant who had obtained leave to answer was at liberty to put in a plea; but that was when he had not before pleaded. Having once pleaded, he cannot again plead without special leave of the Court.

If the Defendant could have shewn that there were proceedings taken in bankruptcy which could be a defence to the suit, that would have been a proper subject of application to the Court; and if the Defendant could have come afterwards and said there were these proceedings pending, then leave would no doubt have been given to him to plead again, in order to bring forward these facts. But it would cause the greatest inconvenience and delay if the Defendant could put in a second plea, as he has done in this case.

(1) 2 Giff. 409; 6 Jur. N.S. 880 (2) 2 Ph. 540.

The effect would be that the plea must be again set down for argument. This could do no good, and only serve to delay and embarrass the Plaintiff.

The plea must be taken off the file, and the Defendant must pay the costs of this motion.

It was subsequently ordered, by consent, that the plea and answer should stand for an answer.

Solicitors for the Plaintiff: Messrs. *Deane & Chubb.*
Solicitor for the Defendant: Mr. *J. R. Miller.*

V.-C. B.
1873
June 3.

LAMBERT *v.* LAMBERT.

[1870 L. 19.]

Administration—Personal Assets—Adjustment of Accounts between Tenant for Life and Remainderman.

2 Ch. D. 199.

The rule laid down in *Allhusen* v. *Whittell* (1), that in adjusting the accounts of a testator's estate between tenant for life and remainderman, the debts and legacies are to be taken as having been paid, not out of capital only, but with such portion of the capital as together with the income of that portion for one year is sufficient for the purpose, is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life.

THIS was an adjourned summons on behalf of the Defendant for the purpose of varying so much of the Chief Clerk's certificate as certified that £4098 16*s.* 3*d.* was the amount of capital which was, with £630 16*s.* 2*d.*, the income for one year on the said amount, required for the payment of the funeral and testamentary expenses, including the costs of the suit, debts, and legacies of the testator, *C. F. Lambert*, and the interest thereon until the time of payment, by substituting in the place of £4098 16*s.* 3*d.* the sum of £4463 12*s.* 10*d.*, and in the place of the sum of £630 16*s.* 2*d.* the sum of £265 9*s.* 7*d.*

The suit was instituted for administration of the estate of *Charles Fernley Lambert*, who, by his will, dated the 16th of March, 1864, gave and bequeathed all his personal estate and effects, including his share and interest in the business of *Lambert & Co.*, silversmiths and jewellers, *Coventry Street, Haymarket* (in which the greater part of his personal estate was employed at his death), and also such other share or interest as he then was or thereafter might become entitled to by right of representation to or as next of kin to his deceased children, or otherwise, to trustees upon trust to convert and out of the proceeds to pay his funeral and testamentary expenses and debts, and invest the residue. And the

(1) Law Rep. 4 Eq. 295.

testator authorized his trustees, with the consent of his wife during her life, and after her death at their sole and entire discretion, to use or employ in the said business such part of his personal estate as should be employed therein at the time of his death, or any other part of his personal estate, with full power to increase or diminish the amount of the personal estate so used and employed. The annual income of the said trust funds was to be paid to his wife for her life, and in case she should marry again, for her separate use and on her sole receipt, and without power of anticipation, and after her death in trust for his children.

The testator died on the 12th of December, 1869.

A bill was filed on behalf of the infant children for adminstration of the estate, and by the decree made on the 19th of February, 1870, the usual accounts and inquiries were directed, and also an inquiry whether so much of the estate as was employed at the death of the testator in the business should continue to be so employed.

By the order made on further consideration, dated the 8th of July, 1872, it was ordered (in accordance with the finding of the Chief Clerk) that the estate of the testator employed in the business should be continued to be employed until the Defendant, his widow, should withdraw her consent thereto; and it was declared that the Defendant, the widow, and tenant for life of the estate, of the testator, was entitled, as part of the income of the trust funds given by the will, to the profits made by such part of the testator's estate as had since his death and should thereafter be employed in carrying on the said business. An inquiry was also directed of what amount of capital, with the income for one year on the amount of such capital, was required for payment of the funeral and testamentary expenses, including the costs of the suit, debts, and legacies of the testator, and interest thereon until the time of payment.

Upon this inquiry the Defendant had carried in evidence by which it appeared that the amount of payments being £4729 2*s.* 5*d.*, £4463 12*s.* 10*d.* was the amount of capital and £265 9*s.* 7*d.* the amount of income for one year required for such payments; the income being assumed to be 5 per cent., although the income actually produced by the business amounted to 15 per cent.

The Plaintiffs (the infant children of the testator interested in

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remainder) had carried in a counter-statement shewing that the whole amount of capital was £10,209 7*s.* 11*d.*, and the income, including profits, £1571 8*s.* 5*d.*, making together £11,780 16*s.* 4*d.* The funeral and testamentary expenses and debts, &c., amounted to £4729 2*s.* 5*d.*; and the proportion of the £11,780 16*s.* 4*d.* attributable to income and profits being £1571 8*s.* 5*d.*, the proportion of the £4729 2*s.* 5*d.* attributable to income and profits was therefore £630 16*s.* 2*d.* Deducting this sum from the £4729 2*s.* 5*d.*, £4098 6*s.* 3*d.* was left as the amount of capital required.

The Chief Clerk, by his certificate of the 18th of April, 1873, had adopted the view of the Plaintiffs, and found that £4098 6*s.* 3*d.* was the amount of capital which, with £630 16*s.* 2*d.*, the income for one year on the said amount, was required for payment of the funeral and testamentary expenses, including the costs of the suit, debts, and legacies of the testator, and the interest thereon until the time of payment. It appeared that the debts, funeral and testamentary expenses, had all been paid within a year from the testator's death.

Mr. *Kay*, Q.C., and Mr. *C. Hall*, in support of the summons to vary:—

The Chief Clerk has proceeded upon the rule supposed to have been laid down in *Allhusen* v. *Whittell* (1), that for payment of debts and legacies (with interest at 5 per cent. for one year) such portion of the capital is to be taken as, together with the income of that portion for one year, whatever be the amount of income (5 per cent. or 20 per cent.), will be sufficient for the purpose. The result is, that not only the interest of the debts will have to be paid out of the income, but part of the income will be applied in paying the capital of the debts. We contend, in the interest of the tenant for life, that the capital of the debts and legacies is payable out of capital only, and that the income is only to be resorted to when, by postponing payment, the testator's estate has become liable to interest upon the debts and legacies. To that extent, and that extent only, is the tenant for life, who is entitled to all the income which is not required for the purposes of the estate, to be mulcted. If, on the other hand, the debts and legacies (as in this case) are all paid within the year before the income

(1) Law Rep. 4 Eq. 295.

has accrued, there can be no reason, either on principle or authority, for throwing any part of the actual payment upon the future income of the estate during the year. Bearing in mind the observations of Sir *William Page Wood* in *Allhusen* v. *Whittell* (1)—"The Court will take care that the accounts shall be modelled in such a way as to do justice to all persons who may be interested in the estate. . . Every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts, and which is found to be in a proper state of investment"—we say that the principle of that decision has been improperly extended by the Chief Clerk to the present case, in which, from the debts, &c., having been paid within the year, the income, which was not earned until the end of the year, ought not to be applied retrospectively towards payments made before that income was ascertained or had accrued. The executors have a year given them within which they may postpone payment of debts and legacies, and upon the debts so postponed interest becomes payable. But they are not bound to wait until the end of the year for the purpose of ascertaining the amount of income earned by the estate, and then to take the whole income, whatever may be the amount, and so much only of the capital as, with that income, is required for payment of debts, &c. The effect would be, if the tenant died within the year, that his estate would get nothing, and that the extra income would be capitalised for the benefit of those in remainder. In this case the debts have all been paid within the year; the estate was no longer burdened with interest, which ceased from the moment of payment, and we submit that the rule in *Allhusen* v. *Whittell* does not apply, especially in a case like this, where the income resulting from the employment of the capital in the business, as directed by the testator, was very much larger than the interest on the debts.

Mr. *Amphlett*, Q.C., and Mr. *Rowcliffe*, for the infant Plaintiffs, were not called on.

SIR JAMES BACON, V.C.:—

Everything arises upon the will, which is the foundation and origin of the whole thing. The finding upon the inquiry which

(1) Law Rep. 4 Eq. 302.

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was directed is, that a certain sum was required for payment of the funeral and testamentary expenses and debts. Nobody has said that the sum found was not required, and but for the apparent hardship that the tenant for life who was getting 15 per cent. is deprived of that amount by the result of the inquiry, there would be no ground of argument that I know of. I can see no difference between a sum producing income by being invested in consols and a sum producing a much larger income by being invested in a goldsmith's business. The principle enunciated in *Allhusen* v. *Whittell* (1) must govern, if applicable to this case; and in spite of the argument that has been addressed to me, I am unable to draw any distinction between that and the present case. The summons will be dismissed.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle.*

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HARVEY *v.* HALL.

[1870 H. 157.]

Practice—Debtors Act—Attachment.

An order made against *A.*, a solicitor, under the *Debtors Act*, for payment of money by a certain day, with notice that in default his property would be liable to sequestration and himself to be arrested and committed to prison, was followed by the issue of a *fi. fa.*, under which the sheriffs took possession. An arrangement was then made by which the sheriffs withdrew from possession, upon an engagement by *A.* to pay the amount, costs, charges, and interest, by monthly instalments, and in default that they should re-enter under the original order and proceed with the execution of the warrant as if they had not withdrawn from possession.

Default having been made in payment of the instalments:—

Held, that, after the arrangement for withdrawing from possession and payment by instalments, *A.* could not be attached for default.

MR. *G. W. LAWRANCE* moved on behalf of the Plaintiff for an attachment against *J. C. Hall*, a solicitor, for non-compliance with an order of the 22nd of December, 1870, for payment by him to the receiver in the cause of the balance due from him.

The order, which was dated the 22nd of December, 1870, was that "*J. C. Hall*, one of the solicitors of this Court, and solicitor

(1) Law Rep. 4 Eq. 295.

on the record for the Defendant, do, on or before the 21st of January, 1871, pay to *J. J. Saffery*, the receiver in the cause, the sum of £131 6*s.* 11*d.*, and pay to Plaintiff his costs of the application."

The order, which was served on the 19th of January, 1871, was thus indorsed:—"If you the within-named *J. C. Hall* neglect to obey this order by the time therein limited, you will be liable to have your property sequestered for the purpose of compelling you to obey the same order, and you may also be liable to be arrested and committed to prison."

In February, 1871, Plaintiff issued a *fi. fa.* against the goods of *J. C. Hall*, for recovery of the £131 6*s.* 11*d.*

After possession had been taken by the sheriffs of *London* under the *fi. fa.*, an arrangement was entered into by *J. C. Hall*, under which the sheriffs withdrew from possession. The arrangement was embodied in a memorandum addressed to the sheriffs, by which, in consideration of their withdrawing from possession of the effects seized by them at his offices, he (*Hall*) consented thereby, in default of his paying them the sum of £15 on the 1st of June, and £15 on the 1st of every succeeding month until the whole amount ordered to be paid by him, together with the costs of execution, interest at 4 per cent. per annum, and sheriffs' charges, should have been paid and satisfied, to their re-entering and taking possession under the same warrant under which they were then in possession, and proceeding with the execution thereof, just in the same manner as if they had not so withdrawn.

The arrangement had not been fully carried out by *Hall*, and the sum of £55 13*s.* 11*d.* still remained due for principal, with £7 5*s.* 10*d.* for interest; and the object of the present application was to enforce by attachment the original order of the 22nd of December, 1870.

SIR JAMES BACON, V.C., was of opinion that under the arrangement between *Hall* and the sheriffs there had been such an interference with the terms of the original order that an attachment could not now be issued, and declined to make any order upon the motion.

Solicitors: Messrs. *Lawrance, Plews, & Co.*

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In re ELMSLIE & CO.
Ex parte TOWER SUBWAY COMPANY.

[1873 E. 13.]

Solicitor and Client—Taxation of Bill of Costs after Expiration of Twelve Months from Delivery—Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 37.

Existence of the relation of solicitor and client is not alone a "sufficient circumstance" within the statute, 6 & 7 Vict. c. 73, s. 37, to justify a reference for taxation after the expiration of twelve months from the delivery of the bill of costs.

Observations on *In re Nicholson* (1), *In re Flower* (2), and *In re Dickson* (3).

ADJOURNED SUMMONS.

The application was made in the matter of *John Foster Elmslie, Alexander Forsyth,* and *George Alfred Sedgwick,* solicitors, on the part of the *Tower Subway Company,* that the following bills of costs of *Elmslie & Co.* against the company, delivered on the 9th of November, 1871, that was to say (specifying fourteen bills in as many different matters, amounting together to £913 3*s.* 1*d.*), and also the following bills of costs of *Elmslie & Co.* against the company, delivered on the 31st of August, 1872 (specifying seven bills in other matters, amounting together to £304 4*s.* 1*d.*), might be referred to the Taxing Master to tax and settle, with the usual directions.

Messrs. *Elmslie, Forsyth, & Sedgwick* were the first solicitors of the company, and continued to act as the company's solicitors down to the 18th of October, 1872.

The summons was dated the 8th of February, 1873.

The only question arose on the former set of bills, which was delivered more than twelve months before the date of the summons.

The summons was supported by the evidence of *Peter William Barlow,* civil engineer, who was chairman of directors of the company, and by that of *Peter William Barlow* the younger, who from the 28th of March, 1872, had been the secretary of the

(1) 3 D. F. & J. 93. (2) 18 L. T. (N.S.) 457; 16 W. R. 749.
(3) 8 D. M. & G. 655.

company, and was opposed by the evidence of Mr. *Forsyth*, of the firm of *Elmslie & Co.*

The following facts appeared:—

For some time prior to September, 1871, the solicitors had been urged by Mr. *Barlow* to have the two years' bills of costs from the 1st of July, 1869, to the 30th of June, 1871, made out, and directions were given accordingly. Whilst the bills were being made out, in July, 1871, Mr. *Barlow* made a verbal proposal to the firm that they should accept in payment of the bills then being made out, as well as of other bills already delivered and unpaid, one half the amount in cash, and the other half in £5 per cent. preference shares of the company, issued to pay £6 per cent. On the 25th of July, *Elmslie & Co.* wrote a letter to Mr. *Barlow* signifying their acceptance of the proposal.

In the early part of August, 1871, Mr. *Forsyth* sent to Mr. *Theobald*, the then secretary of the company (not the bills, but) a statement of the amounts of the several bills, in fourteen items, amounting together to £914 6*s.* 1*d.*

On the 9th of September, 1871, Mr. *Forsyth* wrote on the subject of the settlement, and soon after had an interview with Mr. *Theobald*, after which he communicated with his partners, and on the 30th of September, 1871, a letter was addressed by *Elmslie & Co.* to Mr. *Theobald*, as follows:—

"We have, since our Mr. *Forsyth* saw you, referred to our accounts against the company with the view to their adjustment. The balance of £552 16*s.* 7*d.* appearing in our books against the company consists principally of cash advances, and is of long standing. No reduction, therefore, can be asked or expected to be made by us, especially as we have not charged the company interest upon our advances.

"With regard to the bills delivered to the 30th of June last, amounting to £914 16*s.* 1*d.*, as a very considerable portion of them consists of outlay, we think we shall be dealing fairly by making a reduction of £5 per cent. from the gross amount. This reduction would amount to £45 14*s.*, and would leave due to us on this account £868 12*s.* 1*d.*

"We understand from you that the company is at once prepared to pay us the balance on our books of £552 16*s.* 7*d.*, and also

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Messrs. *Dyson's* account for £329 6*s.*, and that the £868 12*s.* 1*d.* shall be paid so soon as the sale of the property late in the occupation of Mr. *Shand* is completed.

"We arranged with Mr. *Barlow* on the 24th of July to take half our bills in cash, and for the balance, preference shares, to be issued to pay £6 per cent., which we presume is now abandoned. We understand, however, that in lieu of that arrangement the £868 12*s.* 1*d.* will be paid out of the proceeds of the re-sale of *Shand's* house, and in the meantime be deemed a lien upon that property."

On the 10th, and again on the 21st of October, 1871, the solicitors wrote for payment, and on the 26th Mr. *Barlow* wrote to say: "I am trying to obtain some money for the *Southwark and City* expenses; but it is necessary I should have the total amount of your claim before I can do any good. . . . . I hope you will press *Green's* case. When settled, and *Shand's* sold, I shall have some cash from directors, which you can have."

On the 9th of November, 1871, as above stated, the first set of bills was delivered, and with them was sent also a letter addressed by the solicitors to the secretary of the company, in which the writers said: "We take this opportunity of sending you our bills yet undelivered up to the 30th of June last, and amounting, as per the statement we sent you, to £914 6*s.* 1*d.*, and we beg to call your attention to our letter of the 30th of September last, and to ask that you will procure and send us the company's cheque for £552 16*s.* 7*d.*, the old balance appearing in our books, and £329 6*s.*, the amount of Messrs. *Dyson's* charges."

On the 17th of February, 1872, Mr. *Barlow* wrote to the solicitors as follows:—

"The house" (meaning *Shand's* house) "will be sold on Tuesday, and the money paid to you. . . . I suggest, if we accept of your proposal to take off a small sum, that you should be paid thus: say all but £200 in cash at once, and the £200 or £300 to be paid in two years out of revenue, interest being paid in the meantime. This will enable us to divide a minimum dividend of £5 per cent. on the old shares, instead of £4, as proposed, and thus give a more encouraging report, and indirectly assist in getting

capital in the *Southwark and City*, at the same time leave a surplus of dividend to pay our deficiency of capital. The *Southwark and City* stands thus: *Ricardo* asks for more time, I propose two months, and if he does not get the capital, I propose to come to you to see what can be done. In the meantime say what you will do as to your accounts with the *Tower Subway*, and whether you have any additions, and what, to your bills delivered." In a postscript Mr. *Barlow* added, "The large amount of your account compared with our capital, and the sacrifice the directors have had to make to get the capital, will justify me, from my experience in dealing with solicitors of your eminence, in expecting a liberal proposal as to your account."

On the 20th of February the solicitors answered as follows:—

"In order to carry out the objects therein referred to we are willing to vary the arrangements contained in our letter to Mr. *Theobald* of the 30th of September last to the extent proposed by you, viz., we are to receive the proceeds of the sale of *Shand's* premises, and to apply them in discharge of our accounts delivered, less £300, which is to stand over for two years at £5 per cent. interest. The company, however, must give us an acknowledgment of indebtedness under seal in the usual form, payable in two years, with the interest half-yearly in the meantime."

The sale of *Shand's* premises was not completed till the 30th of May, 1872, on which day the solicitors received from the purchaser, pursuant to a written authority under the seal of the company, the sum of £685. On the 3rd of June they further received from the auctioneers the sum of £91 0*s.* 5*d.*, being the residue of the deposit, less charges.

On the 19th of July, 1872, Mr. *Barlow*, jun., then the secretary of the company, wrote to the solicitors, saying he was directed to request they would advance to the company the £300, part of the proceeds of *Shand's* house, as agreed in their letter of the 20th of February, and that they would prepare the acknowledgment of indebtedness referred to in the same letter, and send it to the secretary's office on or before the 24th instant, on which day there was to be a board meeting.

To this letter the solicitors did not reply.

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On the 31st of July, 1872, the secretary wrote respecting the balance of £552 16*s.* 7*d.* He said, "We do not find this to agree with our accounts. Will you send details of this immediately?"

On the 14th of August, 1872, the secretary wrote to the solicitors, enclosing a copy of a resolution passed at a board meeting on the previous day, and begging them to send in their account as soon as possible.

The resolution was, "That the solicitors be now informed that the board do not now require the advance of £300 from them, and that they be requested to furnish an explanation of the above balance of £552 16*s.* 7*d.*, and to send a detailed account relating to all matters up to the present date, so that the same may be considered previous to the half year's general meeting of the company to be held on Tuesday, the 27th of August, 1872."

Further correspondence followed, principally with regard to the second set of bills; and, finally, on the 18th of October, 1872, it was resolved that Messrs. *Paine & Layton*, solicitors, be requested to examine the bills of costs and cash account, and to communicate with the company's solicitors.

A long list of small items of overcharge was alleged, amongst which was one of £2 2*s.* for attending every board meeting, without reference to the time occupied, or to whether such meetings were regularly constituted or not.

Mr. *Barlow*, in his evidence, said that the first set of bills never was paid; and that, after the receipt of the letter of the 20th of February, 1871, he considered it was arranged that the company's solicitors should make a reduction of £45 14*s.* from the total amount of the first set of bills, and that they should pay to the company £300. The first set of bills had not been investigated. Repeated applications for the repayment of the £300 were made to the solicitors, but without effect.

Mr. *Forsyth* deposed that the proceeds of the sale of *Shand's* house turned out to be much less than was expected, and said that as the letter of the 19th of July, 1872, seemed to shew that the chairman and directors did not intend to apply the £300 in carrying out the terms to which the firm had by their letter of the 20th of February, 1872, consented, but that they intended to abandon that arrangement, as they had abandoned the former;

and as further charges had been incurred during the year from June, 1871, to June, 1872; and as the company were pressing the firm for the delivery of such bills, and directions had been given that they should be prepared with all possible dispatch, the firm postponed answering the letter of the 19th of July, 1872.

He added explanations in justification of the charges in the bills.

With reference to the charges for attending informal and other board meetings, he said that for many years it had been "the almost universal practice amongst solicitors of joint stock companies practising in *London* to charge and be allowed the sum of two guineas for attending every meeting of directors at which their presence is required, without reference to the time actually occupied by such attendances, and whether such meetings are regularly constituted board meetings or otherwise."

Mr. *Rodwell*, for the company:—

The "special circumstance" upon which I rely as taking the case out of the 37th section of the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), is the continuance of the relation of solicitor and client down to the 18th of October, 1872: *In re Nicholson* (1); *In re* (erroneously named *Ex parte*) *Flower* (2).

As to the overcharges, I do not say they are so gross as to amount to fraud; but I maintain that the fact that there are a number of items that ought to be taxed, will be taken into consideration in estimating what are special circumstances.

Mr. *Kay*, Q.C., and Mr. *Solomon*, for Messrs. *Elmslie & Co.*:—

The cases on this subject are collected in *Morgan's* Chancery Acts and Orders (3).

To justify a reference to tax after the expiration of twelve months from the delivery of the bill, there must be either pressure or overcharge amounting to fraud: *Horlock* v. *Smith* (4); *In re Strother* (5). Neither of these is shewn, or even alleged, in this instance.

(1) 3 D. F. & J. 93.
(2) 18 L. T. (N.S.) 457; S. C. *sub nom. In re F——*, 16 W. R. 749.
(3) 4th Ed. pp. 17, 18.
(4) 2 My. & Cr. 495.
(5) 3 K. & J. 518, 522.

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Independently of this, we say that during the long negotiation that took place the items were never objected to. The account was rendered in August, 1871. Prior to this we had offered to take half in cash and half in preference shares, which offer they accepted, but afterwards abandoned. After August, 1871, we offered to strike off £45 14*s.* from the amount of £914 6*s.* 1*d.*, provided that we should be paid the total of £858 12*s.* out of the proceeds of the sale of *Shand's* house; and in the meantime have a lien on that property. This was not objected to, but virtually accepted, as appears by Mr. *Barlow's* letter of October, 1871. Then, on the 9th of November, 1871, the bills in full were delivered, and in February, 1872, comes Mr. *Barlow's* letter proposing arrangements for the payment of the whole amount, without any deduction, except the £45 14*s.*, to which proposal we, on the 20th of February, again accede. Part of this arrangement was that we should take the proceeds of the sale of *Shand's* house, out of which we part paid ourselves; and the company were to give us an acknowledgment for the rest. After this it is impossible for the company to allege special circumstances for taking the case out of the statute.

If the existence of the relationship of solicitor and client is to be taken as a special circumstance in every case, the Act will be reduced to a dead letter.

Mr. *Rodwell*, in reply:—

The result of the evidence is, that every attempt at a settlement failed, and there never was a binding compact between the parties.

It is not necessary to shew that there have been gross overcharges, if it can be shewn that there has been a continuous system of overcharge: *In re Dickson* (1).

Sir James Bacon, V.C.:—

This case, like all others which occur under the *Solicitors Act*, is of great importance, not only as regards the practice of the Court, but as relating to the public interests which that statute was intended mainly to protect, whilst at the same time its

(1) 8 D. M. & G. 655.

object was to do justice to the solicitors, having regard especially to the relation which exists between solicitor and client.

Nothing is plainer than the enactment in the statute that a bill which has been delivered by a solicitor and has been in the hands of the client for twelve months, shall not, after the expiration of that period, be subject to taxation, unless some special circumstances be alleged and proved to the Court to which the application is made.

Here, it is beyond doubt, that the bills were delivered more than twelve months before any application was made to tax them, and the single question is, whether the special circumstances which have been adverted to ought to induce the Court to say that that provision in the 37th section of the Act does not apply. Payment there has been none; therefore, the other section that has been referred to has no application; the 37th is the section which is to govern the case. I do not understand the Respondents to argue that there has been either payment or settlement. Mr. *Rodwell*, in his reply, treated that as one of the heads of opposition to his application; but I do not understand that the Respondents allege either payment or anything equivalent to a settlement; but they say that, in considering the special circumstances to which the applicant is obliged to resort in support of his application, what took place in the way of settlement is to be regarded, and the true effect of that attempted settlement is to be considered.

Now the relation of solicitor and client subsisted, no doubt, during the time that these bills were running, and for some time afterwards. I do not find from any of the authorities that it is said or meant to be said that the relation of solicitor and client is of itself conclusive. It may be an important circumstance, but it cannot be inferred from anything that has been decided, that, supposing solicitor and client bills to be delivered regularly at the end of every year, and retained by the client for twenty years, if at the end of the twentieth year the client desires to tax all the bills, he is to be at liberty to do so on the ground that the relation of solicitor and client has for so long subsisted. It is quite true that there are some observations in *In re Nicholson* (1),

(1) 3 D. F. & J. 93.

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falling from Lord Justice *Knight Bruce* (1), which do refer to the existence of the relation between solicitor and client, but those observations are made in a case in which he expresses himself doubtfully—conjecturally, not positively—and in which it was plain from the perusal of the bills that there were erroneous and improper charges—charges which it was confessed at the Bar could not be maintained against the client.

The relation of solicitor and client, therefore, I do not think amounts to a special circumstance which justifies the taxation of these bills.

Well, then, the other special circumstances are very remarkable. Before I part with *In re Nicholson* I may refer also to *In re Flower* (2), which is quite distinguishable from the present case, because, not only from the judgment of the Master of the Rolls, which was read, but from the statement of the facts, which was not read, and which might be inferred from the terms of the judgment, it is quite clear that no such question as that which arises here was there presented to the Court. In that case there had been a decree to take the account of a testator's estate (3). The solicitors had been employed by the testator in his lifetime, and after his death the representatives continued to employ the same solicitors down to December, 1867, when an order was made to change them. The report continues (4): "When this change took place the old solicitors were applied to for the papers in the matter, and their bills of costs; and on the 21st of January they delivered four bills. It appeared that three other bills had previously been delivered"—the question could only apply, of course, to the three bills previously delivered—"The old solicitors had been in the habit of receiving moneys on account of the testator's estate, out of which they had retained moneys sufficient to pay two of the last-mentioned bills, and to reduce the third." A common summons to tax was taken out, which the solicitors opposed, and that was the question the Master of the Rolls had to decide. The representatives of the testator had to carry in their accounts; whatever was properly payable to the solicitors they would be

(1) 3 D. F. & J. 102. (2) 18 L. T. (N.S.) 457; 16 W. R. 749. (3) This appears from the *Weekly Reporter* report. (4) 18 L. T. (N.S.) 457.

allowed, and their charges and expenses, and the question arose whether in those charges and expenses was to be included the net amount of what the solicitors had charged, or only the amount which the trustees ought to have paid, and would have been obliged to pay to the solicitors, if the bills had been taxed. There can be no doubt of the view which the Master of the Rolls took of the subject. He treated it as being a question in the administration of the estate, and relating solely to the amount which the executors as representatives could charge against the estate. What his Lordship said was this: "I entertain no doubt these bills must be taxed; in fact the circumstances are very special in this case. It is a very important circumstance, as Lord Justice *Knight Bruce* points out in one case"—*In re Nicholson* (1)—"that the relation of solicitor and client must cease when bills are delivered. That is not always a matter of importance, if a solicitor has been the family solicitor for a great number of years for all kinds of business when he delivers his bill. He may deliver it every year, and then it ought to be paid or taxed in the ordinary time. But where a solicitor is employed for a particular business, such as the administration of an estate for trustees for life interests, and the transaction is to be completed, his bill forms a part of that transaction." After stating the facts of the case His Lordship continued: "These gentlemen were solicitors for both sides, I do not object to that; indeed, it is often an advantageous circumstance to the clients, but then those clients should have been told—it was the duty of the solicitors to tell them—that if the bills stood over for twelve months they might never be taxed at all, and the result would be the clients, the trustees, might have to pay more than they would be allowed in their charges and expenses." It is impossible to conceive that a solicitor acting for trustees who are only to be reimbursed their proper charges, could satisfactorily discharge his duty to his clients without telling them: If you pay me this bill of costs you may never get the money back again, because you will only have a right to charge against the estate so much as this bill would amount to when it should have been taxed. "It was the duty of the solicitor to tell his client how the matter stood." Then his Lordship refers to a case in

(1) 3 D. F. & J. 93.

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which he was personally engaged, and in which he acted upon that principle. *In re Flower* (1), therefore, in my opinion, so far from being an authority in favour of establishing the special circumstances which are requisite to justify a reference for taxation in this case, goes just the other way. Nor do the observations of Lord Justice *Turner* in *In re Dickson* (2) carry it any further. There the circumstances of the case justified the order which had been made; the Court was satisfied that there were special circumstances, and the appeal from Vice-Chancellor *Wood's* order was dismissed.

Now, what are the special circumstances here? Not putting that letter of the 30th of September, 1871, in the light of a bargain, it still has to be considered whether that letter having been written in September, and the bills having been delivered afterwards in November—the twelve months that since elapsed were allowed to elapse under such special circumstances as to justify the interference of the Court.

The letter of the 30th of September, 1871, is very explicit in its terms:—[His Honour read the first two paragraphs of the letter and continued:—]

That is a clear and explicit statement, though erroneous, as appears from the evidence, as to the assertion that the bills had then been delivered. The bills were not actually delivered until the 9th of November, 1871; but the amount of them was distinctly stated in August, 1871. After the proposal to deduct 5 per cent. follow these observations:—[His Honour read the rest of the letter as set out above, and continued:—]

There is no ambiguity, therefore, in the statement of the terms upon which the solicitors and the company were at that time. I think there was no immediate reply to that letter, probably none was necessary, for I read from Mr. *Barlow's* affidavit this: "After the receipt of the last mentioned letter I considered it was arranged that the company's solicitors should make a reduction of £45 14*s.* from the total amount of the bills mentioned in the second paragraph hereof, and that they should pay to the company £300, as proposed by the last mentioned letter." The bills had not then been investigated by the company. Then he

(1) 18 L. T. (N.S.) 457; 16 W. R. 749. (2) 8 D. M. & G. 655, 660.

proceeds to speak of the application for the £300, which I will mention presently. There are some letters which ensue, as stated in Mr. *Forsyth's* affidavit, to which it is not necessary to refer. Then the letter of the 9th of November, 1871, addressed to the secretary and accompanying the bills, does seem of importance—of importance I mean not with relation to any compact, or contract, or settlement, but to the special circumstances which ensued upon the delivery of these bills of costs.

To that letter Mr. *Barlow* replies, but not, as it seems, until the 17th of February 1872, when he writes to Messrs. *Elmslie* and *Forsyth* thus:—[His Honour read the letter, of which an extract is given above, and continued:—]

That letter is answered on the 20th of February by the firm:—[His Honour read this letter, and continued:—]

Now there the matter seems to have dropped, so far as correspondence is concerned, but a sale of *Shand's* property took place. If *Shand's* property had produced £300 more than enough to pay these bills of costs, it is quite clear that the solicitors would have been entitled to receive the whole amount of their bills; for what their proposition contemplated was that, if the sale of *Shand's* property should produce less than, or not more than enough to pay the solicitors the amount of their demands, then in that case £300 was to be given back to the company for their immediate use, and to accomplish the object suggested by Mr. *Barlow* in his letter; but in the meantime the company were, under their seal, to acknowledge that they were indebted to the solicitors for the sum which should be so taken out. A more plain adoption of the £914 6*s.* 1*d.* as a matter which had been, at least, not in dispute, I cannot conceive. I say £914 6*s.* 1*d.*, but I mean that sum subject to the deduction which the solicitors had offered to make, and which, of course, they bargained to make, if the proceeds of *Shand's* house should fail to discharge the whole amount inclusive of the £300. Whatever were the proceeds, the company were to have £300, and for whatever remained due to the solicitors upon the bill of costs—which bills had then been long delivered, and although twelve months had not elapsed, yet sufficient time had elapsed to have read, understood, and disputed them, if any dispute was to be raised about them—for that sum, an acknowledgment under seal

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was to be given. That this was so is beyond all doubt from the subsequent letters of Mr. *Barlow* the younger. His letter of the 19th of July is in these terms:—[His Honour read the letter, and continued:—]

Now, without calling it a bargain, a more distinct adoption of the demand of £914 6*s.* 1*d.*—a more distinct statement of the terms upon which that was to be dealt with—how much the company were to have out of *Shand's* house, and how much they were to give an acknowledgment under seal of their indebtedness for—cannot possibly be conceived.

Then a question seems to have arisen respecting the balance of £552 16*s.* 7*d.*, which, as I understand from Mr. *Rodwell*, is still a subject of discussion and perhaps of litigation between the parties. Then, in another letter of Mr. *Barlow* the younger he writes to say, "We have changed our minds, we do not now want the £300," and, of course, no acknowledgment of indebtedness was given.

Well now, under these circumstances, the company having conducted the matter in the manner I have so far stated, can I say that there are any special circumstances in their favour that can excuse their delay for twelve months? It might have been different if any ground had been suggested; if they had suggested that there had been an inadvertent acceptance of the bills of costs, or if they had said that there was any way in which they had been misled, or in any manner lulled to sleep. On the contrary, I find that they have taken the delivery of the bills of costs as a demand upon them, which they were ready to acknowledge under their seal, making no difficulty or doubt upon the subject, and it is only when afterwards there is some question about the £552 16*s.* 7*d.* cash balance, that they withdraw their request that they may have £300 out of the proceeds of *Shand's* house.

In my opinion there are no special circumstances in this case which should induce me to direct taxation, as far as the conduct and the case of the directors is concerned.

It remains to be considered whether there are such gross overcharges amounting to fraud as would (and, no doubt, if they existed, standing by themselves they would) justify and require the Court to direct a taxation.

Now, the whole of the items alleged to be overcharges are contained in the affidavits; they have been read, and the total amount is said to be £150, according to the assertion of the applicant. Mr. *Forsyth's* affidavit deals with the whole of that subject. What he says is, "You complain of my charging two guineas, whereas in your judgment you, Mr. *Barlow*, who are a civil engineer, say that, upon your oath, one guinea would be enough;" and Mr. *Forsyth* says: "According to the practice of that profession of which I am a member, as we deal with railway companies, two guineas is a reasonable charge." Neither Mr. *Barlow* nor anybody else replies to that affidavit. The other items complained of are charges for attendances on board meetings on days when board meetings were not held. That is answered by Mr. *Forsyth's* affidavit, by stating that he was summoned to attend the directors, and he concluded that it was a board meeting. Attend he did, he says by his affidavit. Then there is a complaint that letters which ought to be charged 3*s.* 6*d.* are charged 5*s.*, and that there is a sort of summary of account for general disbursements and incidental expenses which is larger than, in Mr. *Barlow's* judgment, ought to be included in these bills of costs.

Well, would any of these things, even if they had remained uncontradicted, have amounted to anything like gross overcharge amounting to fraud? Nobody, I think, can say so. All that can be said of them is, that the solicitor takes a view favourable to his own interest when he charges two guineas for that for which Mr. *Barlow*, who represents the client, thinks one guinea would be a sufficient remuneration. Can the Court take notice of that or act upon it? After the bills have been for more than twelve months in the hands of the directors; after the amount has been in a sense—and in no small sense—agreed to; after the terms of remuneration and the manner of settlement have been agreed to; after the solicitors have agreed to an abatement at the instance of the directors, and have agreed to forbear their legal rights at the instance of the directors, in consideration of the circumstances of the company, it is impossible to say that, under these circumstances, there is any "special circumstance" either as to the condition of the bills themselves, before, during, or after the twelve months, or

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as to the contents of the bills now that they have been dissected, and the objections raised by Mr. *Barlow's* affidavit have been answered and explained. To Mr. *Forsyth's* affidavit there has been no affidavit in reply, and there has been no attempt to gainsay anything that Mr. *Forsyth* has said in his affidavit.

In my opinion it would be against the plain provisions as well as against the policy of the Act of Parliament to permit the taxation of bills under these circumstances. I am of opinion, therefore, that I cannot accede to the application that is made to me upon the subject, and it must be refused with costs.

Solicitors: Messrs. *Paine & Layton;* Messrs. *Elmslie, Forsyth, & Sedgwick.*

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[1873 W. 125.]

Gift inter vivos imperfect on Ground of incomplete Delivery—Testamentary Papers anterior to Date of Will found after Death of Testatrix—Invalid Declaration of Trust.

In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach.

An unmarried lady, possessed of large property, being under obligations to the Plaintiff, a servant, called him one day into her room and shewed him a box which, having opened it and put a note inside, she locked and handed to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to the Defendant, a stranger in blood. After her death the box was opened and found to contain a paper writing, dated and signed by the testatrix, and addressed to the Plaintiff, to the effect that the contents of the box were a deed of gift to the Plaintiff of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, *M.*, not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death there was found by the Plaintiff, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the Plaintiff, to the effect that the title deeds

of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of *M.*" :—

Held, that these papers were of a testamentary character, and did not amount to a valid declaration of trust in favour of the Plaintiff.

Richardson v. *Richardson* (1) and *Morgan* v. *Malleson* (2) observed upon.

DEMURRER.

The bill stated that the Plaintiff, *John Warriner*, a plumber and glazier of *Kendal, Cumberland*, having in 1842, when he was a boy of fourteen or fifteen, become acquainted with two ladies, a mother and daughter, named *Brathwaite*, who were then living in a house in *Stramongate, Kendal*, was employed by them to bottle, seal, and stamp bottles of a medicine called "*Black Drop*," the recipe of which had been left to Mrs. *Brathwaite* by her brother-in-law, Mr. *J. A. Brathwaite*, a surgeon. After Mrs. *Brathwaite's* death, which took place in March, 1862, Miss *Brathwaite*, who had succeeded to all her mother's property, continued to employ the Plaintiff in the same way.

The fortune amassed by Mrs. and Miss *Brathwaite* by the sale of this medicine amounted at Miss *Brathwaite's* death to upwards of £100,000.

Some years before her death Miss *Brathwaite* left the house in *Stramongate* and went to live at her country house at *Greenside*, near *Milnthorpe, Westmoreland;* and in 1871, and for about ten years previously, the Plaintiff was allowed to cultivate the garden of the house in *Stramongate* and take the crops for his own use. In this garden was an outhouse, to which no one had access but Miss *Brathwaite* and the Plaintiff.

The bill then alleged (par. 11) as follows :—

On the 7th of November, 1871, Miss *Brathwaite* came from *Greenside* to *Kendal* and sent for the Plaintiff. Upon his coming to the house in *Stramongate* he found there Miss *Brathwaite*, also *John Haston*, a farmer who farmed Miss *Brathwaite's* land at *Greenside*, and his wife. After a time Miss *Brathwaite* dismissed Mr. and Mrs. *Haston*, and when they were gone the following particulars occurred :—

"Miss *Brathwaite* said to the Plaintiff: 'Now, *Warriner*,

(1) Law Rep. 3 Eq. 686. (2) Law Rep. 10 Eq. 475.

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they've gone, come, I want you,' or to that effect. She then took the Plaintiff upstairs, into all the rooms, and she walked round the rooms with the Plaintiff, and told the Plaintiff whom all the pictures which were portraits represented; and she locked up the rooms as she came out, and gave the Plaintiff the keys. When they came to the bedroom, which was in the middle floor, and which was the said Miss *Brathwaite's* bedroom, they went in, and the said Miss *Brathwaite* said to the Plaintiff: 'Go down on your knees, *Warriner*, and pull out a box that is under the bed,' or to that effect, and the Plaintiff did so, and the Plaintiff then got up and stood back, and the said Miss *Brathwaite* opened the box, which was locked with a padlock, and she then put her hand into her satchel and pulled out what appeared to be a note, and put it into the box, and she then locked the box, and after she had done so she said to the Plaintiff: 'There, *Warriner*, take this box into your possession; it will be of some service to you some day, but you must not open it until after my death,' or to that effect. She then put the key of the box into her satchel, and the Plaintiff took the box, and they came out of the room together, and when she came out of the said bedroom she locked the door of the room and took that key with her. This was the only inside door key of the said house which she took away with her." Then, after describing some conversation, the bill went on to state: "When they came back into the yard beside the kitchen door she had the keys of the lower rooms in her hand, and she said: 'You have the other keys all right, take these and stick to them. I don't know anyone half as worthy of them as you,' or to that effect; and the said Miss *Brathwaite* handed to the Plaintiff two keys, being the keys of the dining-room and back parlour. While the said Miss *Brathwaite* and the Plaintiff were at the said house the said Miss *Brathwaite* also handed to the Plaintiff a key, to which was attached an ivory label, having written thereon the word 'piano,' and told the Plaintiff that he was to keep that, and that the piano was for his daughter after her day." Then he left, taking the box. The bill further stated: "The said Miss *Brathwaite* left the said house with the front outside door locked and the key in the lock inside the door; and with the outside kitchen door locked and the key of that door

hanging behind the stable door where the Plaintiff might find it, as he did, in fact, find it."

The bill stated that the Plaintiff did not see Miss *Brathwaite* again till the 24th of February, 1872, when he was sent for, and went to see her at *Greenside*. A conversation took place, which had no reference to the claim made by the bill, and he did not see her again before her death, which took place on the 2nd of March, 1872.

On the 27th of March, 1872, the box which had been given to the Plaintiff was opened at the house of the Plaintiff's solicitor, not having been opened before since it was closed by Miss *Brathwaite*, and in it was found a closed envelope, addressed "*Warriner, Kendal.*" This envelope, on being opened, contained a paper in the handwriting of, and signed by, Miss *Brathwaite* as follows:—

"The contents of this box is a deed of gift to *John Warriner, Kendal*, and all the furniture, silver, glass, china, and the things in the house in *Stramongate*, and my mother's portrait, to be preserved and kept in the family, also my mother's watch and chain and trinkets my mother's wish in care of *John Hayston*, my watch and trinkets for Miss *Warriner*, also in care of *John Hayston*. This is a free gift my mother's wish that *John Warriner* of this town is to have those three houses in *Stramongate*, out-houses, gardens, &c., and also field called *Little Mint's Feet*, and fields at *Lancaster*, *Stizaker*, and *Hatch*, as tenants; also £100 each for all of *Warriner's* children, if anything happened among them the other to be divided among the rest.

"Novr. 6th, 1871.

"*H. Brathwaite.*"

The other things contained in the box consisted of title-deeds relating to a farm called "*Mislet*," belonging to Miss *Brathwaite*, an old will of Miss *Brathwaite*, and five documents relating to transactions between her and her mother.

The bill stated that the above document was the note which Miss *Brathwaite* put into the box on the 7th of November, 1871.

The bill then alleged as follows:—

"20. On the 3rd of April, 1872, the Plaintiff went to the said tool-house, or privy, in order to get out his garden tools, which he

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had not occasion to use during the winter, and which he went then to get with a view to commence working in the garden of the said house of the said Miss *Brathwaite*, in *Stramongate*.

"21. Upon opening the said tool-house, or privy, the Plaintiff found there an envelope addressed in the handwriting of the said Miss *Brathwaite* '*Warriner*.' The envelope was an adhesive envelope, and was closed. The Plaintiff thereupon opened the said envelope, and found therein the following document in the handwriting of, and signed by, the said Miss *Brathwaite*:—

"Again, *Warriner*.

"The deeds, writings, or documents for property in *Stramongate* and fields you will find in a large tin box at *Greenside*, and to be handed over to you free, and all expenses to be paid out of the bulk and writings of *Mislet*, &c. You have all complete which is intended for you, and £100 to be paid down at once to you for repairs at *Mislet* and property in *Stramongate*.

"*Hannah Brathwaite*.

"Novr. 7th, 1871."

"22. This last-mentioned envelope with the said document therein, as the same were found by the Plaintiff, were inside the said tool-house, or privy, resting between the inside wall and the prongs of a garden fork which was leaning against the wall with the handle placed on the ground and the prong against the wall."

The bill stated that the tin box had been in February, 1872, by the direction of Miss *Brathwaite's* agent, removed from *John Haston's* house to the house at *Greenside*; and that it contained the title deeds of the property in *Stramongate*, the field called *Little Mint's Feet*, and the field at *Lancaster*; also the watch, chain, and trinkets referred to in the former document.

After Miss *Brathwaite's* death, a will made by her, dated the 25th of February, 1872, was propounded by the Defendants, *Thomas Rogers*, *Joseph Swainson* the younger, and *John Holme*, whereby, after bequeathing to each of her executors who should act, the sum of £500, she devised and bequeathed the residue of her real and personal estate to the Defendant *Thomas Rogers*, and appointed the three Defendants her executors.

Probate of the will was disputed by the next of kin, but on the 28th of November, 1872, the suit was compromised, and on or about the 10th of January, 1873, probate was granted.

This bill, filed on the 17th of May, 1873, prayed as follows:—

"That it may be declared that the said two documents dated respectively the 6th and 7th of November, 1871, in the handwriting of and signed by the said *Hannah Brathwaite*, being, or purporting to be, a deed of gift, constituted a valid declaration of trust by her for the Plaintiff, *John Warriner*, of the said three houses in *Stramongate*, with the garden and outbuildings and appurtenances aforesaid, and of the said field called '*Little Mint's Feet*,' and the said fields at or near *Lancaster*, and of the said farm called '*Mislet*,' with the appurtenances at *Mislet*, with the title deeds and muniments of title belonging thereto, and of the furniture, silver, glass, china, and the things in the house at *Stramongate* which was in the occupation of the said *Hannah Brathwaite*, and is now in the possession of the Plaintiff, and of the watches and chains, and trinkets, and other things mentioned in the said documents respectively, and that the Plaintiff is entitled to the said property, and to the possession thereof accordingly."

It also prayed an injunction, and for immediate possession, and a receiver.

The Defendants demurred for want of equity.

Mr. *Kay*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Lawson*, for the demurrer:—

The part of the Plaintiff's story which relates to the keys is insignificant. Some of the keys, no doubt, were handed to him, but the outside key was hung up outside the dwelling-house, where he could find it, evidently in order that he might go into the house from time to time and make necessary repairs.

As to the two written documents: they cannot amount to a good gift of personalty *inter vivos*, inasmuch as there was incomplete delivery. The Plaintiff does not pretend that he knew what was in the paper of the 6th of November till after Miss *Brathwaite's* death, and the paper of the 7th of November was not found till after her death. As to the box which contained the former, no

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doubt it was handed to the Plaintiff, but for what purpose? Merely for safe custody. Miss *Brathwaite* kept the key, and retained the ownership. At any time she might have insisted upon the box being returned to her.

Nor can the two papers be a fitting instrument to pass real estate; the utmost they can be said to amount to is a voluntary deed, unenforceable at law or in equity.

In truth, the meaning of these gifts was plainly testamentary. There was no intention to pass any present interest. If there was such an intention, the expression of the intention is incomplete. But being testamentary only, the attempt at disposition must fail as not being within the provisions of the *Wills Act*.

No doubt a declaration of trust may be validly made without delivery of possession, but then the declaration must be clear, and the intention to pass a present interest must be free from doubt: *Ellison* v. *Ellison* (1); *Ex parte Pye* (2); *Sloane* v. *Cadogan* (3); *Beatson* v. *Beatson* (4); *Searle* v. *Law* (5); *Bridge* v. *Bridge* (6); *Pearson* v. *Amicable Insurance Office* (7); *Woodford* v. *Charnley* (8); *Milroy* v. *Lord* (9).

The Plaintiff is, therefore, in this dilemma: if these papers are a deed of gift they will not amount to a declaration of trust; if they are a declaration of trust they cannot amount to a deed of gift.

The only cases to the contrary are *Richardson* v. *Richardson* (10) and *Morgan* v. *Malleson* (11). But of *Richardson* v. *Richardson* it must be observed that the Vice-Chancellor appears to have misconceived the effect of *Kekewich* v. *Manning* (12), a decision which really is no authority for the proposition considered to be deducible from it (13); and *Morgan* v. *Malleson* is at variance with the stream of authority, especially with *Woodford* v. *Charnley* and *Price* v. *Price* (14).

(1) 1 Tu. L. C. 245; 6 Ves. 656.
(2) 18 Ves. 140.
(3) Rolls, Dec. 1808; mentioned Sug. V. & P. 13th Ed., p. ~~710~~ 591, referring to App. No. 24 of former Editions.
(4) 12 Sim. 281.
(5) 15 Ibid. 95.
(6) 16 Beav. 315.
(7) 27 Beav. 229.
(8) 28 Ibid 96.
(9) 4 D. F. & J. 264.
(10) Law Rep. 3 Eq. 686.
(11) Ibid. 10 Eq. 475.
(12) 1 D. M. & G. 176.
(13) Law Rep. 3 Eq. 692, 693.
(14) 14 Beav. 598, 602.

Mr. *Eddis*, Q.C., and Mr. *Marten*, for the bill:—

The value of the story about the keys is, that it contributes with other circumstances to shew what was the donor's intention. Where an intention is evident to declare a trust of property, the Court will give to the instrument a liberal construction; that is, if the intention be clear, the Court will hold the instrument, however informal, to be a good declaration of trust; *Ex parte Pye* (1); *Kekewich* v. *Manning* (2); *Richardson* v. *Richardson* (3); *Penfold* v. *Mould* (4); *Morgan* v. *Malleson* (5); *Tate* v. *Leithead* (6); *Exton* v. *Scott* (7).

We admit it to be necessary to the Plaintiff's case to shew that this was a present, not a testamentary or ambulatory gift. But the evidence really does amount to this. The Plaintiff kept the box; Miss *Brathwaite* no doubt kept the key, but why? because she was tenant for life, and the declaration of trust was to be subject to her own life estate. As to the reversionary interest, it was a complete and irrevocable disposition on her part, both as to the realty and the personalty.

The real question is, was there an intention to pass a present interest to take effect in possession at Miss *Brathwaite's* death. If that can be established the Court will find a valid declaration of trust. Supposing she had executed these documents under seal. Could there then have been any doubt? *Meek* v. *Kettlewell* (8); *Penfold* v. *Mould*. The absence of a seal makes no difference in equity.

The following authorities were also referred to: *Sugden's* Vendors and Purchasers (9); *Donaldson* v. *Donaldson* (10); *Airey* v. *Hall* (11); *Parnell* v. *Hingston* (12); *Langley* v. *Thomas* (13); *Grant* v. *Grant* (14); *Edwards* v. *Jones* (15).

Where there is an instrument in writing disposing of real estate, though not under seal, and where there is a parol expression of

(1) 18 Ves. 140.
(2) 1 D. M. & G. 176.
(3) Law Rep. 3 Eq. 686.
(4) Ibid. 4 Eq. 562.
(5) Ibid. 10 Eq. 475.
(6) Kay, 658.
(7) 6 Sim. 31.
(8) 1 Hare, 464; 1 Ph. 342.
(9) 13th Ed. p. ~~719.~~ 594.
(10) Kay, 711.
(11) 3 Sm. & Giff. 315. 2 Jur. N.S. 658
(12) Ibid. 337. 2 Jur. N.S. 854
(13) 26 L. J. (Ch.) 609. 3 Jur. N.S. 345
(14) 34 Beav. 623. 11 Jur. N.S. 787
(15) 1 My. & Cr. 226.

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intention to dispose of personal estate, delivery is not necessary in order to create a trust. Delivery is not a necessary element to constitute a declaration of trust.

SIR JAMES BACON, V.C.:—

Mr. *Kay*, I will not trouble you to reply in this case.

The bill prays for a declaration by the Court in the following terms:—[His Honour read the first paragraph of the prayer, as set out above, and continued:—]

The claim is therefore put in the pleadings, and, indeed, the stress of the argument on the part of the Plaintiff has been that the documents referred to constitute a valid declaration of trust by Miss *Brathwaite* of the several things which are there mentioned.

Now, the rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to, the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest.

The two exceptions I have referred to are the cases of *Richardson* v. *Richardson* (1) and *Morgan* v. *Malleson* (2). In those two cases the test of the principle which I have referred to was distinctly raised—in the one, plainly by the terms of the deed, in the other, in the judgment of the Master of the Rolls, for he seems to have considered, in *Morgan* v. *Malleson*, that after the memorandum had been signed the person signing it ceased to be the owner of the *India* bond. It is quite clear in *Richardson* v. *Richardson* that the grantor, or assignor, or whatever he was, ceased upon the execution of the deed to be the owner of the things which he thereby assigned, and which included the whole of his personal estate. If it were necessary, but I do not think it is, to go further into the case of *Morgan* v. *Malleson*, I should require to examine it and consider the facts much more closely than I now think it

(1) Law Rep. 3 Eq. 686. (2) Law Rep. 10 Eq. 475.

necessary to do in order to determine what the real bearing of that case is. I am strongly inclined to believe that there must be some imperfection in the report of it, because what staggers me most is to find that the decision, as it stands, would seem to establish that if a man writes a letter to say, "I have given" a bank note, or an Indian bond, or anything else, "to *A. B.*" and no more, and retains the bank note or bond and the memorandum in his own possession, that letter has a valid operation as between himself and *A. B.* If that were all that appeared in the case I should certainly consider such a letter to be a mere nullity.

However, as I have said, all the other cases, including *Kekewich* v. *Manning* (1), and most especially *Milroy* v. *Lord* (2), have put the test, I think, upon a satisfactory footing. I take the exposition of the law as it is to be found in the judgment of Lord Justice *Turner* to express that rule of law distinctly. After stating that he has given full and anxious consideration to the subject, he thus expresses himself (3): "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift." Nothing can be more clear and distinct than the exposition of the law contained in the sentences I have read, and to my judgment nothing more satisfactory, if I were at liberty (which I am not) to pronounce a critical opinion upon it.

But it was said in the course of the argument that the case of

(1) 1 D. M. & G. 176. (2) 4 D. F. & J. 264. S. Jun. 1806

(3) 4 D. F. & J. 274. S. Jun. 1809

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Ex parte Pye (1) might be relied upon by the Plaintiff, for the reasons which were there alleged. When *Ex parte Pye* comes to be examined it falls most distinctly within the definition contained in the sentences I have read. *Ex parte Pye* was this: An owner of property directs his agent in *Paris* to purchase an annuity for the benefit of a lady. He gives that direction expressly by writing; there is no doubt about it. His directions are only partially and imperfectly carried into effect, and he finds by a communication from his agent in *Paris* that the agent, instead of doing what he had been directed to do, and which would at once have made the annuity the property of the lady, has bought the annuity in the name of the donor, as I may call him. The donor upon that, being perfectly surprised and displeased, as I may assume, sends the agent a power of attorney immediately. For what purpose? Not to make any new gift, but to rectify the error which had been committed. The power of attorney must be read as if the donor had said: "This has been all wrong; you have put money into my name which is not mine. I gave that money away by the first paper; it is the lady's money, not mine; make haste and set right that which you have done wrong." Lord *Eldon's* judgment, it is to be observed, proceeds emphatically upon the documents before him. I conceive, therefore, that in *Ex parte Pye*, although consistently with the rules there laid down there may not have been a complete transfer, yet that there had been a parting with the possession. The meaning and intention of the transaction was, plainly, to give the property to a person who, when she had once received it, might have done what she would with it, if she were of sound mind.

Nor does any one of the cases, in my opinion, in the slightest degree support the notion that documents such as those which are pleaded in this bill can amount to a valid declaration of trust.

I think the case is fairly enough stated upon the bill. I find no attempt at exaggeration—no matters stated which, as far as I can judge, are certain to be the subject of dispute. I should not be at liberty to go into them if I had any suspicion upon that subject; but I think it is just to the Plaintiff to say, that the case, as he states it, raises no kind of suspicion as to his sincerity or

(1) 18 Ves. 140.

truthfulness. Then what is it? A lady, it seems of considerable wealth, has acquaintance, more or less close, with the Plaintiff—not very close—he had been employed as a tradesman in her house, and had been permitted by her to cultivate for his own use a garden in an unoccupied dwelling-house which she had at *Stramongate*, near *Kendal*. He describes a visit by her, and the conversation which took place between them. What he says is this:—[His Honour read the paper from the 11th paragraph of the bill extracted above, and continued:—]

Then he speaks of a conversation which he had with her, when she was almost at the point of death, which I need not dwell upon, for although the Plaintiff says she talked about business, about coming to *Kendal* at Easter, and what she was going to do, he does not say that there was any conversation which relates to the subject of this suit.

Then upon the box being opened there is found in it the document upon which the Plaintiff files his bill, and which is said to be, and which the Court is invited to decide to be, a declaration in favour of *John Warriner*. Now if the words only of the memorandum are read, I should be led to the conclusion that besides the things which the Plaintiff says the box contained, there was also a deed of gift, because the words are very plain: "The contents of this box is a deed of gift to *John Warriner, Kendal*." No deed of gift is produced, and it is not suggested that there was any other thing than this memorandum which can be supposed to be a deed of gift. The memorandum proceeds:—[His Honour read the rest of the sentence, observing upon the words "my mother's wish," that there was there evidently some error of expression, and resumed:—]

There the sense of that part of the thing ends. So that, as it stands, the memorandum asserts that this box does contain a gift to *John Warriner* of all the furniture. But there is no sort of disposition of, nor any notion of what is to be done with it. If it were comprised in the deed of gift it would be intelligible, but there is no mention of it in the paper which I am called upon to expound and give effect to. Then this follows:—[His Honour read the remaining portion of the memorandum and continued:—]

Now, to a man of common sense nothing can be clearer than

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that whatever was intended by this memorandum it was not to take effect until after the death of the person who wrote and signed it. There was no intention of parting at present with anything. The chattels are to remain in *Haston's* possession. The furniture is to remain in the house, the outer door of which had been carefully locked. There is not a word like a donation by means of a deed of gift. But when the last part of the memorandum is looked at, the matter is put beyond the possibility of a doubt, for the language is: "Also £100 each for all of *Warriner's* children, if anything happened among them the other to be divided among the rest." That, if it is anything, is a legacy which is not to take effect until after her death. There is no suggestion that it is anything but that.

It does not rest only upon that, for another document is referred to, which was found under strange circumstances, but which I must take upon this demurrer to be truly stated; and, indeed, I have no reason to doubt the truth of the statement. This was a paper which was stuck up between the prongs of a garden fork and the wall in the tool house or privy, upon the premises where this interview took place. That proceeds thus:—[His Honour read the document.]

That paper does speak of the time present. That speaks of "deeds" to be handed over to the Plaintiff, of the existence of which, until he read the contents of the box, he was ignorant. This document he finds and reads on the 3rd of April, 1872, after Miss *Brathwaite's* death.

[His Honour read the 20th and 22nd paragraphs of the bill as above stated, and continued:—]

This is a remarkable story; but as I have said, I must take the statement in the bill as a true statement. Taking it, however, as it stands, and giving no more importance to it than it deserves, this second paper is, as I conceive, as clearly testamentary as anything possibly can be. The Plaintiff does not pretend that there was any communication between him and Miss *Brathwaite*, or that there was any suggestion that he should have any present possession or any present benefit. The terms are "£100 to be paid down at once," and, further, as it has been observed, "all expenses to be paid out of the bulk." I am not at liberty to

adopt implicitly the suggestion which Mr. *Jackson* has made upon this, when he referred to the signification of the word "bulk" among north country people, and said that it meant residue. It may or may not; I know nothing about that, and I give no opinion on that subject. But I say that this is, as I read it, a very plain direction by *Hannah Brathwaite* that after her death the tin box containing the deeds should be handed over, that £100 should then be paid down at once, and that all expenses should be paid out of her estate.

It is hardly necessary to observe (indeed it has not been argued to the contrary) that if the character of the paper is testamentary, then of course it is impossible to enlarge or convert it into a declaration of trust. The danger is great if such an attempt were to succeed; because then the result of such a transaction as this would be, that the solemn disposition of property which the law requires to be made in the shape of a will, would be entirely lost sight of, because this would be as good a disposition, or perhaps better, than any will which could be made.

Then it is said that the possession of this box by the Plaintiff establishes his title. His possession, under the circumstances that he states, is nothing. He says that Miss *Brathwaite* said to him in effect: "I desire you to take into your possession and to stick by this box, the key of which I keep." What sort of possession is that? Can it be doubted, for a moment, that if the next day, or any other day afterwards, she had said, "Give me back that box," that he must have given it to her? The nearest justice of the peace, or, if he had not jurisdiction, the nearest County Court, if it had been necessary to appeal to the law, would have been at once sufficient. She would have said: "It is my box, I gave it to you to take care of it for me, and desired you to stick to it; I keep the key, now give it me back." If she had said that, he would have had no answer.

Upon the whole, finding, as I do, that the law upon the subject is clear and distinct, and needs no other exposition or reference than that which I have read from *Milroy* v. *Lord* (1), I think that this does not amount to a declaration of trust; I add to that, that, in my judgment, the papers themselves, or the letters,

(1) 4 D. F. & J. 274.

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must be taken as purely testamentary, that is to say, that they were to have no effect during the life of Miss *Brathwaite*, and that, therefore, they are of no validity or effect to support the Plaintiff's title. The demurrer, therefore, must be allowed.

Solicitor for the Plaintiff: Mr. *H. S. Willett*, agent for Mr. *R. F. Thompson, Kendal.*

Solicitor for the Defendants: Mr. *J. H. Johnson.*

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In re UNITED PORTS AND GENERAL INSURANCE COMPANY.

EVENS' CLAIM.

Company—Transfer of Business—Novation.

In October, 1868, an agreement was entered into between two insurance companies (*A.* and *B.*), by which *Company A.* sold its business to *Company B.*, which was to undertake the liabilities and risks upon existing policies, and, if required, issue new policies in exchange. *Company A.* was to be wound up voluntarily under liquidators nominated by *Company B.*, and all its assets and property were to be collected by *B.* and distributed amongst *A.'s* creditors, with full power for *B.* to act on and use the name of *A.*

On the 27th of November, 1868, an order was made on the petition of a creditor for compulsorily winding-up *A.*

X., the transferee of a policy on the life of *Z.* granted by *A.*, paid the annual premium to *A.* in October, 1868, by whom it was received as agents for *B.* (pursuant to resolution), and in December, 1868, sent the policy to *B.* for indorsement

Z. died in January, 1869, and in March the policy was indorsed with a memorandum, duly signed and sealed, that the property of *Company B.* should alone be liable for payment of the sum assured, and with a further memorandum that the claim of *X.* on the policy was admitted payable by instalments on specified days with interest.

These instalments were paid in part, but an order having been made in November, 1869, to wind up *B.* compulsorily:—

Held, that there was good consideration for the memorandum; that there was complete novation; and that *X.* was entitled to prove against *Company B.* for the balance due upon the policy.

ADJOURNED SUMMONS on a claim by *John Henry Evens* against the *United Ports and General Insurance Company* for the balance due upon a policy of insurance of which he was the assignee.

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EVENS' CLAIM.

On the 6th of September, 1867, *Charles Bunyard* effected a policy upon his own life for £500 with the *General Provident Assurance Company, Limited*, and on the 10th of August, 1868, *Bunyard* assigned this policy to *Evens* by way of mortgage.

About this time the business of the *General Provident* was transferred to the *Etna Insurance Company*, and on the 27th of August, 1868, a policy for £500 was issued by the *Etna Company* in substitution for the one granted to *Bunyard* by the *General Provident Company*.

The *United Ports and General Insurance Company* was registered on the 24th of October, 1868, and on the 29th of October, 1868, an agreement was entered into between the *Etna* and the *United Ports Companies*, by which the *Etna* sold its business to the *United Ports* in consideration of £20,000, in shares of £1 each; and the *United Ports* were to undertake from the date thereof the liabilities and risks upon existing policies, and, if required, to issue new policies in exchange. To facilitate the carrying out of the agreement, the *Etna* was to be wound up voluntarily, and two persons named therein connected with the *United Ports* were to be liquidators. All the assets and property of the *Etna Company* were to be collected by the *United Ports*, and, after deducting therefrom all sums advanced or paid on account of the *Etna Company* as therein agreed, were to be distributed rateably amongst the creditors of the *Etna*, with full power of attorney for the *United Ports* to act on, and to use, the name of the *Etna*.

At a meeting of the *United Ports Company*, held on the 30th of October, it was resolved that, for the facility of the business, the *Etna Company* be requested to continue its business and use the name of the *Etna Company*, but at the risk of the *United Ports Company*, until a further resolution of the board.

On the same day *Evens* paid the premium due on *Bunyard's* policy to the *Etna Company*.

At this time the *Etna Company* was in difficulties, and on the 3rd of November, 1868, a petition was presented in the Court of the Vice-Chancellor of *Ireland* for a winding-up order. An attempt was made to get the petition to stand over, in order to hold the necessary meetings for passing resolutions to wind up voluntarily, and to adopt the agreement of the 29th of October; but on the

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27th of November, 1868, an order was made by the Vice-Chancellor of *Ireland* directing the company to be compulsorily wound up.

On the 21st of January, 1869, *Bunyard* died; and on the following day notice was given to the *United Ports* of *Evens'* claim upon the policy which he had sent to them for indorsement on the 31st of December, 1868.

On the 28th of January, 1869, a resolution was passed at a board meeting of the *United Ports*, that the agreement with the *Etna* be carried out in its integrity; and in answer to an application by the solicitors of *Evens*, the manager of the *United Ports* wrote, on the 4th of February, 1869:—"I am instructed by the board to inform you that, in the event of an agreement by the company and the *Etna Insurance Company, Limited*, being carried out in its integrity, the company will, without doubt, recognise the claim mentioned in your favour." The solicitors of *Evens* wrote requesting a more definite answer, and their letter contained this passage:—"Is it not true that your company has, as we have been informed, taken over the policies and liabilities of the *Etna?*"—the policy in question included—"because, if your company have done so, we really cannot be affected by your relations in other respects with the *Etna;* and as to the agreement being carried out in its integrity, that would probably take a very long time, and be, in fact, an indefinite postponement of recognition of all claims. If you have not taken over the policy liabilities, for what purpose have you retained the policies received by you for indorsement?"

After some further correspondence, it was resolved at a board meeting to admit the claim; and on the 25th of March, 1869, the policy was indorsed with the following memorandum:—"It is hereby declared that the capital, stock, and property of the *United Ports and General Insurance Company of London*, as provided for in the articles of association of the said company, shall alone be liable for the due payment of the sum of £500 assured by the within policy with the *Etna Insurance Company of Dublin* to the person or persons legally entitled to receive the same. In witness whereof, the common seal of the company having been hereunto affixed, we, two of the directors and manager of the said *United Ports and General Insuranee Company*, have hereunto set our hands this 18th day of March, 1869," &c.

"Memorandum.—The claim of Mr. *John Harry Evens* under this policy is admitted payable:—Two hundred and fifty pounds on the 30th June next, and two hundred and fifty pounds on the 30th September next, with interest on the latter sum at five pounds per cent. per annum from the 30th June next.

"Dated this 25th day of March, 1869. By order of the Board of Directors of the *United Ports and General Insurance Company.*"

[This was signed by the managing director.]

On the 24th of June, 1869, the *Ports Company* cancelled the agreement of the 29th of October, 1868, in consequence of the *Etna Company* having failed to comply with the terms therein contained. They had, however, on the 15th of July, paid £125, and on the 30th of August, 1869, £62 10*s.*, to *Evens*, in pursuance of the arrangement indorsed upon the policy. On the 6th of November, 1869, an order was made for winding up the *United Ports Company.*

Mr. *Evens* now claimed to be entitled to prove against the *United Ports Company* for the balance due to him upon the policy.

Mr. *Horton Smith* (Mr. *Kay*, Q.C., with him), in support of the claim, contended that there had been a clear admission of liability on the part of the *United Ports Company*, both in the letter signed by their manager and in the memorandum indorsed upon the policy, by which *Evens* had been induced to "novate" and accept the liability of the new company, and give up that of the *Etna.* This admission of liability having been followed by part payment made the case all the stronger in favour of *Evens*, who was entitled to receive the balance, with interest up to the date of the winding-up order.

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the official liquidator of the *United Ports Company*:—

The agreement under which the *United Ports Company* were to receive the assets and discharge the liabilities of the *Etna* was put an end to and rendered incapable of performance by the order for compulsorily winding up the *Etna*, and as the consideration failed, the *United Ports Company* were absolved from all liability to the creditors of the *Etna*, including *Evens*, who was distinctly informed

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by the letter of the 4th of February, 1869, that recognition of his claim was contingent upon the agreement with the *Etna* being carried out in its integrity. Reliance had been placed upon the memorandum indorsed upon the policy as an admission of liability binding the *United Ports*, but the memorandum, for which there was no consideration moving to the *United Ports Company*, was a mere *nudum pactum*, and could not be enforced. The *United Ports* never received any premiums upon this policy; for the payment of the 30th of October, 1868, though said to have been made by *Evens* to the *Etna* as agents for and on behalf of the *United Ports*, was made without notice or knowledge by him of any arrangement between the two companies, and was in no sense a payment to the *United Ports* so as to create a consideration for the memorandum. The memorandum, therefore, being invalid for want of consideration, either expressed or existing, could not be set up and have validity given to it by payments made under it subsequently in the company's own wrong; still less by the fact that it was executed under seal by directors who had no authority to bind the company to that which was *ultrà vires*. The claim could not, therefore, be sustained.

[They cited *Ex parte Blood* (1) upon the question of novation.]

Mr. *Kay*, in reply:—

Mr. *Evens* insisted upon knowing which of the two companies he was to treat as his debtor, and was told in reply that the *United Ports* would undertake to discharge the claim, and that their assets would alone be liable. He was thereby induced to "novate" and accept the liability of the new company in lieu of the old; and the engagement thus entered into on behalf of the *United Ports* by the manager of the *United Ports*, with express or implied authority to bind his company (*Brown* v. *Black* (2)), and confirmed by the subsequent transactions, could not now be repudiated. The agreement with *Evens* was not void for want of consideration, as the *United Ports* had by their agents, the *Etna Company*, received his premium.

[He also referred to the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), for the purpose of shewing that it was not

(1) Law Rep. 9 Eq. 316. (2) Law Rep. 15 Eq. 363.

essential to the validity of an agreement that the consideration should be therein expressed.]

SIR JAMES BACON, V.C.:—

The ground upon which this claim is mainly resisted is, that there was no consideration between the claimant, Mr. *Evens*, and the *United Ports Company;* and if that could be established, and if it were necessary to inquire into the consideration—if it was reduced, in short, to the case of a mere *nudum pactum*, then of course no legal right could be founded upon it. The *Statute of Frauds* requires that an engagement to pay the debts of another should be in writing, and that the consideration should be stated, but the *Mercantile Law Amendment Act* has altered that law, by providing that "no special promise to be made by any person after the passing of this Act"—which was in the year 1856—"to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, shall be deemed invalid by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." So that if it was to be treated as merely a guarantee for the debt owing originally by the *Etna Company*—as a debt, the life having dropped—the question would be whether that indorsement upon the policy was made for a consideration or not—not a consideration between Mr. *Evens* and the company, but made for a consideration or not—the necessity of expressing the consideration being abrogated by that clause of the Act of Parliament to which I have referred. Upon the admitted facts of the case there had been most abundant consideration to induce the *United Ports Company* to take upon themselves the engagement expressed in this memorandum, for they had procured an agreement, the effect of which was to transfer to them all the assets of the *Etna Company*. That that agreement was not carried into effect is a circumstance which cannot in the least affect the question of consideration. For a consideration, which may have turned out to be less advantageous than they thought it was, they had engaged to do certain things. It appears that they had received a not inconsiderable sum of money, although I do not forget that I have been told that they paid a larger sum of money. Subject, of course, to anything a

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compulsory order might do, they had acquired a legal right to possess all the assets of the *Etna Company* upon the terms that they should discharge all the liabilities of that company; and the matter being then not in a concluded state, by a resolution of the 30th of October, 1868, it was, upon consideration as to the best mode of preserving the connection and continuing the existing business of the *Etna Insurance Company, Limited*, of which the *Ports Company* had become then the purchasers and were the owners, it being for their interest therefore to continue that business—it was resolved that, "for the facility of business, the *Etna Insurance Company, Limited*, be and is hereby requested to continue its business, and use the name of the *Etna Insurance Company, Limited*, but at the risk of this company until a further resolution of the board." No further resolution was passed, and after the passing of that resolution the premium last paid upon this policy of assurance was received by the *Etna Company*. Can there be any question that that was money had and received by the *Etna Company* to the use of the *Ports Company?* Could there be any answer to an action brought, if it was brought, only for the amount of the premium then paid? The money was the money of the *Ports Company*. By contract between the two companies it came into the hands of the *Etna*, but it was, nevertheless, by virtue of the same contract, the money of the *Ports Company*, and might have been sued for by them; and that was the state of things when the difficulties broke out by the presenting of the petition for a compulsory winding-up. The importance of that I am quite at a loss to see. The *Ports Company* did not think it of much importance, because it is found, by the resolution which they afterwards passed, they instructed their solicitors to take measures for getting that order for a compulsory winding-up rescinded, and a voluntary winding-up substituted, whether with or without supervision does not at present signify. But they held to this bargain throughout, up to the month of December, when the policies were sent to the *Ports Company* upon their invitation, with some knowledge, as I gather, on the part of Mr. *Evens* (though that is not quite clear) that they had taken upon themselves the obligation, and there they remain—these policies of assurance, of which one only is now in question before me—and are the subject of that corre-

spondence, the effect of which is beyond the possibility of a doubt. The obligation of the *Ports Company* to take upon themselves the debt or the engagement—debt it had become after the 1st of January, engagement only it was when the policies were first of all sent to the *Ports Company*—continued, and was the subject of that somewhat lengthened correspondence. There is a desire on the part of the *Ports Company* to postpone that which they were required by Mr. *Evens'* solicitors to do until after the whole affair between them and the *Etna* had been settled. That is resisted on the part of Mr. *Evens*, who says, "I won't take that as an answer; what you are doing with the *Etna Company* does not concern me; the question between you and me is as to this policy of assurance." At length, and after due deliberation, this memorandum is indorsed upon the policy of assurance :—

[His Honour referred to the terms of the above-stated memorandum :—]

That memorandum, dated the 18th of March, 1869, is received, adopted, and acted upon by Mr. *Evens*, and it is impossible to say, upon any principle that has been recognised in these winding-up cases, that Mr. *Evens* could, after receiving and accepting it, have made any claim against the *Etna Company*. It is equally impossible, in my judgment, to doubt that this is to be treated for all purposes as if it were a new engagement, not an engagement of guarantee, but an entirely new engagement within the competence of the *United Ports Company*, and pledging the assets of that company alone to the payment of the £500, the amount of the policy upon which the indorsement is made. Then follows this :—

"Receipts for premiums for the renewal of this policy must be on the printed forms," &c; so that, at the same time they take upon themselves the obligation, they assert the right to receive the premiums. I am quite aware that premiums were not payable in this case, but in point of right they were entitled to receive all the benefits that could accrue to the *Etna Company* in respect of this policy of assurance. Well, is there not abundant consideration,—though not expressed in the memorandum,—for the *Ports Company* to take upon themselves this obligation, and a consideration which, as I have said, had been partly performed? But the case stands, in my judgment, much higher than that

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of a mere guarantee, and I treat this as an independent, separate—as if it had been an original—contract on the part of the *United Ports Company* to insure for the benefit of Mr. *Evens*, who was then the owner of the policy, although it is not so expressed; and that which was the intention of the parties must, to the greatest possible extent, govern a dealing of this sort. That that was the intention of the parties is plain, for the time of payment having come, Mr. *Evens*, being capable of asserting his right in that respect against the *Etna Company*, if he had not relinquished his claim against them, enters into a separate, independent agreement with the *United Ports Company*, that they shall pay him by instalments the sum for which, by the previous memorandum, they had acknowledged themselves to be indebted to him. The memorandum effecting that object, bearing date the 25th of March, 1869, is signed by the managing director, by the order of the company, and, more than that, has to a considerable extent been acted upon, because two payments have been made, though not to the full amount that they ought to have been made, in respect of that memorandum, and in accordance with those terms. The claim of Mr. *Evens* is irresistible. He relinquished his claim upon the *Etna* in consideration of the indorsed memorandum, which is clear and plain in its terms, and consistent with the transactions which have been referred to in the course of the evidence. It was an engagement entered into by them for full consideration, as far as the *Etna Company* was concerned, and for sufficient consideration as far as Mr. *Evens* was concerned. In my opinion, the claim for the balance which is due, after giving credit for the sums which have been paid, must be allowed to Mr. *Evens*.

Solicitors: Messrs. *Sheppard & Riley*; Mr. *Pulbrook*.

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[1868 C. 290.]

WILLIAMS *v.* SAME.

[1869 W. 39.]

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1873
June 28;
July 1, 2, 4.

Company—Voluntary Winding-up for Purpose of Invalid Amalgamation—Sanction of Liquidators to transfer—Qualified Sanction—Compulsory Winding-up—Effect upon previous Voluntary Liquidation—Companies Act, 1862, *ss.* 22, 35, 38, 51, 84, 95, 129, 130, 131, 133, 138, 146.

Plaintiffs contracted to purchase shares in a company, and shortly afterwards the directors (with the Plaintiffs' knowledge) agreed to amalgamate with another company. Resolutions (the validity of which was disputed on the ground of insufficient notice) were passed and confirmed at two successive meetings, for amalgamation, and that "for enabling the said agreement and the amalgamation thereby agreed on to be carried into effect," the company should be wound up voluntarily. Immediately before the confirmation meeting one of the Plaintiffs agreed to sell his shares; and the other Plaintiff having purchased as agent merely, transfers from the two Plaintiffs, one to his principal, the other to his purchaser, were executed; but, upon the transfers being presented for registration, the liquidators refused to register, except on the terms of the Plaintiffs executing deeds-poll, whereby they should agree to guarantee to the liquidators payment by their transferees of all calls. Plaintiffs accordingly executed the deeds. Afterwards the company were ordered to be wound up compulsorily; and by a decree of the Court the agreement for amalgamation and consequent resolutions were held to be *ultrà vires* and not binding on any dissentient member of the company.

Actions having been commenced by the official liquidators against the Plaintiffs upon the guarantee deeds, bills were filed alleging that the liquidation was invalid, and that the deeds were obtained without consideration, and by misrepresentation and concealment, and were null and void, and ought to be cancelled:—

Held, that the liquidation-resolution was valid, and that the charges of want of consideration, misrepresentation, and concealment failed; and bills dismissed with costs.

Observations on the powers of voluntary liquidators, and on the effect of proceedings under a voluntary winding-up, when followed by a compulsory order.

THESE two causes were heard together.

On the 24th of March, 1865, an agreement was come to between the directors of the Defendants, the *Financial Corporation, Limited*, and the directors of the *Oriental Commercial Bank, Limited*, for the amalgamation of the two companies; and a circular dated the

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25th of March was issued by the directors of the corporation and sent to all the shareholders, together with a notice, "that an extraordinary general meeting of the shareholders of the" corporation would be held on the 12th of April "for the purpose of carrying into effect the amalgamation of" the corporation with the bank, pursuant to the terms of the agreement, "and in order thereto of passing a resolution for winding up the company voluntarily."

The meeting was held on the 12th of April, and the following resolutions were passed:—

1. "That the *Financial Corporation, Limited*, shall be amalgamated with the *Oriental Commercial Bank, Limited*, pursuant to the terms and conditions of the memorandum or preliminary agreement, dated the 24th of March, 1865, and signed by certain directors of the said bank and of the said corporation."

2. "That for enabling the said agreement and the amalgamation thereby agreed on to be carried into effect, the said *Financial Corporation, Limited*, shall be wound up voluntarily."

3. "That the directors of the said *Financial Corporation, Limited*, are hereby authorized and requested to take and do all other proper and necessary steps and things as and for the purposes of the said voluntary winding-up and for the said amalgamation, and for carrying the same into effect pursuant to the said agreement."

On the 22nd of April another notice was sent to the shareholders that the above resolutions had been passed at the meeting of the 12th of April, and that another meeting would be held on the 9th of May, "for the purpose of confirming as a special resolution the aforesaid resolution of the said meeting of the 12th day of April, and, in particular, the said resolution for winding up voluntarily the" corporation, and also for the purpose of appointing liquidators.

On the 9th of May the meeting was held, and a resolution was passed confirming the resolutions passed at the meeting of the 12th of April; and it was also resolved that *Robert Collum* and *Thomas Key*, two of the directors, and *Cornelius Walford*, the managing director, of the corporation, should be appointed liquidators.

On the 27th of April, 1865, the Plaintiff, *Charles Cleve*, acting as agent for *Demetrio Pappa*, the secretary of the corporation, purchased on the *Stock Exchange* 500 shares (being £20 shares on which £1 had been paid) in the corporation. On the 26th of May he paid for the shares, and was afterwards repaid by *Pappa;* and on the 30th of May two transfers of the 500 shares were executed —one to *Cleve*, and the other from *Cleve* to *Pappa*. The latter was post-dated the 2nd of June, 1865.

On the 2nd of June, 1865, at a meeting of the liquidators (at which meeting a committee of shareholders were also present), it was resolved that no transfer should thereafter be entered in the books of the company without a written guarantee from the transferor to pay all calls.

The Defendant *Collum*, by his answer to the original bill, alleged that at another meeting of liquidators, on the 7th of June, a circular was directed to be prepared, which was afterwards dated the 9th of June, and was, as he believed, sent to all the transferors who before that date had left, or who afterwards left, transfers for registration, informing them that the committee of shareholders, having had the subject submitted to them by the liquidators, were of opinion that no transfer should be passed as from and after the 9th of May then last without a guarantee.

On the 10th of November, 1865, a bill was filed by *William James Clinch*, on behalf of himself and all other the shareholders in the corporation except the Defendants thereto, against the corporation, the directors of the corporation, including *Collum*, *Key*, and *Walford*, and the directors of the bank, praying (amongst other things) a declaration that the resolutions of the 12th of April, 1865, were not binding on the Plaintiff, and that the deed of indemnity obtained from him was void.

On the 18th of April, 1866, *Cleve* received a notice from the secretary of the corporation that a transfer of 500 shares had been handed to them for registration, which they should be happy to register on his signing the accompanying form of indemnity and paying the stamp duty.

The form of indemnity, so far as material, was as follows:—

"To all to whom these presents shall come [the transferor] sendeth greeting. Whereas [the transferor] was on

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the day of last the registered owner of the several shares . . . specified in the schedule hereto. And whereas [the transferor] being desirous of selling and transferring the said shares to [the transferee] for valuable consideration, requested the liquidators duly appointed under the said voluntary winding-up to sanction such transfer; and in order to induce them so to do he agreed to enter into and execute the covenants and guarantee hereinafter expressed. And whereas, on the faith of the said covenants and guarantee, and in consideration thereof, by a deed of transfer" (describing it) "the said shares have been duly transferred by the said [transferor] to the said [transferee] with the sanction of the said liquidators, and the name of the said [transferee] hath been since entered by such liquidators on the register of members of the" corporation "as the present holder of such shares. Now these presents witness that, in pursuance of the said agreement, and in consideration of the premises and of the said liquidators having sanctioned the said transfer as hereinbefore recited," the transferor thereby covenanted with the corporation and with *Collum, Key,* and *Walford,* the present and other the liquidators, that he, the transferor, would, "without prejudice to the liability of" the transferee to the corporation, pay all calls; and further, that the present deed should "be and operate as a continuing covenant and guarantee . . ."

On the 20th of April, 1866, one of these forms, in which were inserted *Cleve's* name as transferor and that of *Pappa* as transferee, was executed as a deed by *Cleve.*

On the 28th of May, 1866, an order was made to wind up the corporation compulsorily on a petition which was presented on the 16th of May (1).

(1) The bill in *Clinch* v. *Financial Corporation* [1865 C. 230] was amended on the 3rd of July, 1866, and as amended prayed as follows:—

1. "That it may be declared that the said arrangement so as aforesaid come to between the directors of the corporation and the directors of the bank for an amalgamation of the said two companies upon the terms aforesaid was beyond the power of the directors of the corporation, and was not authorized by the articles of association thereof, and that such arrangement is not binding on the Plaintiff nor on any of the members of or shareholders in the corporation.

2. "That it may be declared that the said resolutions of the 12th day of April, 1865, were not within the powers

On the 28th of February, 1868, a decree in *Clinch* v. *Financial Corporation* was made by the then Vice-Chancellor *Wood* (1). So far as material, the decree was as follows:—

"This Court doth declare that the arrangement in the Plaintiff's bill mentioned, come to between the directors of the *Financial Corporation, Limited*, and the directors of the *Oriental Commercial Bank, Limited*, for an amalgamation of the two companies on the terms in the said bill mentioned, was beyond the power of the directors of the said *Financial Corporation, Limited*, and was not authorized by the articles of association thereof, and that such arrangement is not binding on the Plaintiff, nor on any of the members of or shareholders in the said *Financial Corporation, Limited*.

"And it is declared that the resolutions of the 12th of April, 1865, in the said bill mentioned were not within the powers of a

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of a general or any other meeting of that corporation, and were not authorized by the memorandum or articles of association of the company, nor by the *Companies Act*, 1862, and that the same are not binding on the Plaintiff or on any other dissentient member of the corporation.

3. "That it may be declared that the resolutions passed at the said meeting of the 9th day of May, 1865, were not a due confirmation of the resolutions passed on the 12th day of April, 1865, and that the said resolutions were void for want of such confirmation.

4. "That it may be declared that such resolutions are null and void, as having been carried by means of such misrepresentation and concealment as aforesaid on the part of the directors of the corporation.

5. "That it may be declared that such agreement for amalgamation as aforesaid is null and void by reason of the variations between the terms thereof and the statements contained concerning the same in the said circular of the 27th of March, 1865.

6. "That the corporation and the directors and official liquidators thereof, and the bank and the directors thereof, may respectively be restrained from carrying the said proposed amalgamation into effect.

7. "That the liquidator of the corporation may in like manner be restrained from parting with or handing over to the directors of the bank the assets of the corporation, or any part thereof, in pursuance of the said agreement, or of any other arrangement or agreement to the same or any similar effect.

8. "That the bank and the directors thereof may in like manner be restrained from receiving the assets of the corporation, or any part thereof, in pursuance of any such arrangement or agreement as aforesaid.

9. "That the Defendants, other than the corporation and the official liquidators thereof, or some of them, may pay the costs of this suit.

10. For further relief.

(1) See the report, Law Rep. 5 Eq. 450.

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general or any other meeting of the said *Financial Corporation, Limited*, and were not authorized by the memorandum or articles of association of the said corporation, nor by the *Companies Act*, 1862, and that the same are not binding on the Plaintiff or any other dissentient member of the said *Financial Corporation, Limited;* and doth decree the same accordingly."

On appeal this decree was, on the 6th of November, 1868, affirmed by the Lord Chancellor (*Cairns*) and the Lords Justices (*Wood* and *Selwyn*), with a variation which did not affect the above declarations (1).

On the 8th of July, 1868, an action was commenced against the Plaintiff by the corporation on the indemnity deed for calls unpaid, and on the 18th of December, 1868, the bill was filed by *Cleve* against the corporation, *Collum*, *Key*, and *Walford*.

It alleged that one of the secret terms of the amalgamation was that £5000 should be paid to *Walford* out of the assets of the amalgamated company; that the resolutions were altogether *ultrà vires* and void for want of authority in the directors; that the Plaintiff had no knowledge, till long after the time, that the purport of the amalgamation agreement was untruly stated in the circular of the 27th of March, 1865, or that the £5000 had been promised to *Walford;* that on the 15th of May, 1865, the Plaintiff's broker, acting on his instructions, applied to the vendor's broker to have the name of *Pappa* (who was then a responsible person) substituted for his (Plaintiff's) in the transfer deed, but that the Defendant *Key*, who knew that *Pappa* was the real purchaser, insisted upon having the transfer made to the Plaintiff; that not until about the 15th of April, 1866, was the Plaintiff aware that the transfer to *Pappa* had not been registered; (by amendment) that he never heard of the circular dated the 9th of June, 1865; that the indemnity deed was executed under concealment, misrepresentation, and pressure; and that he had no defence to the action.

The bill prayed as follows:—

1. "That it may be declared that the said deed-poll of the 20th of April, 1866, was obtained from the Plaintiff without considera-

(1) Law Rep. 4 Ch. 117.

tion, by misrepresentation and concealment on the part of the Defendants, and by the unlawful threat of retaining the Plaintiff's name on the register of shareholders of the corporation, and that the said deed-poll is null and void, and ought to be delivered up to be cancelled.

2. "That it may be declared that the Plaintiff is not liable to pay any calls made upon the said 500 shares hereinbefore mentioned, or if he should be held to be under any liability in respect of the said shares, then that the Defendants *Robert Collum*, *Thomas Key*, and *Cornelius Walford* are bound to indemnify him against it.

3. "That the said deed-poll may be ordered to be delivered up to be cancelled."

The bill also prayed for an injunction to stay the action, and that if it should be held that the Plaintiff was under any liability in respect of the shares, all proper directions, inquiries, and accounts might be given for the purpose of compelling *Collum*, *Key*, and *Walford* respectively to indemnify the Plaintiff.

The bill was amended on the 24th of June, 1869.

The Plaintiff in *Williams* v. *Financial Corporation* was *Thomas George Williams*, who, on the 9th of February, 1865, purchased fifty shares in the corporation, and in March 200 more. Transfers to him were executed at various dates during February, March, and April, the last being for seventy-five of the shares on the 1st of April.

On the 8th of May, 1865, he sold the shares on the *Exchange*, 200 being purchased by *Nichau Harentz* and fifty by *Edward Adam Adams*. Transfer deeds, both dated the 25th of May, to *Harentz* and *Adams*, were executed by *Williams*.

On the 17th of July, 1865, *Williams* executed one of the above indemnity forms as a deed, his name having been inserted as transferor, and that of *Harentz* as transferee of 200 shares; and at a liquidators' meeting on the 26th of July the transfer was ordered to be, and shortly after was, registered.

Another form, with *Williams* as transferor and *Adams* as transferee, was executed in March, 1866, and at a meeting held on the

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16th of April following this transfer was ordered to be, and was shortly after, registered.

On the 8th of July, 1868, an action was commenced; and the bill was filed on the 10th of February, 1869, against the same Defendants.

It alleged that it had, previously to the meeting of the 9th of May, been fraudulently agreed that a sum of £5000 should be paid to *Walford;* that the amalgamation had been contrived by *Walford* for fraudulent purposes; that as between the Plaintiff and all the Defendants knowledge of such fraudulent purposes ought to be imputed to the Defendants; that the resolutions were altogether *ultrà vires* and void; that the liquidators "improperly and illegally" refused to register the transfers unless the Plaintiff would execute the deeds-poll; that he was "coerced into" giving his consent to execute the deeds; and that he had no defence to the action.

The prayer of the bill was identical, *mutatis mutandis,* with that in *Cleve* v. *Financial Corporation.*

From the answers it appeared that on the 19th of May, 1865, the liquidators and a committee of shareholders of the corporation met, and it was agreed that counsel's opinion should be taken; and it was in pursuance of this and other legal advice that they resolved that no transfer should be accepted without a guarantee.

The results of the evidence as to the charges of misrepresentation, concealment, and pressure, are summed up in His Honour's judgment.

Williams' suit was opened first.

Mr. *Benjamin,* Q.C., and Mr. *Bradford,* for the Plaintiff *Williams*:—

The charges of misrepresentation and concealment upon which relief is prayed are fully established by the judgment of Lord *Hatherley,* when Vice-Chancellor *Wood,* in *Clinch* v. *Financial Corporation* (1), a judgment which in this respect was in no way disturbed by the decree of the Lords Justices (2).

The effect of the extortion of this guarantee from the transferor was to create a new class of contributories unknown to the statute

(1) Law Rep. 5 Eq. 450. (2) Law Rep. 4 Ch. 117, 120.

(sect. 38), a class neither of A. contributories nor of B., but intermediate to both.

In *Weston's Case* (1) the duty (sect. 22) of directors (in the absence of any special provision to the contrary) to register transfers of shares is clearly pointed out. If it be said that these were liquidators and not directors, the questions arise, Had they ceased to be directors? Were they liquidators at all? Was there any valid liquidation of any kind? That a defective notice (defective in this instance, because accompanied by a circular specifying terms of amalgamation different from those that were actually proposed and carried) vitiates the whole of the winding-up appears from *In re Bridport Old Brewery Company* (2); *In re Imperial Bank of China* (3). The only *dictum* to the contrary is to be found in *In re Irrigation Company of France* (4).

[They also referred to *Smith's* Leading Cases (5).]

Mr. *Higgins*, Q.C., and Mr. *Hemming*, for the Plaintiff *Cleve*:—

The deeds are invalid on two grounds: the special circumstances in which the Plaintiff stood when he executed; and the circumstances in which the so-called liquidators stood.

That the attempted amalgamation was invalid no one denies. We further say that there was no valid voluntary winding-up of the company. Its only purpose was to carry out the amalgamation afterwards decreed to be void. Further, the notice was bad; such a notice would not have made a good special resolution; hence not a good winding-up within the 129th section, clause 2, either in intent, purpose, or form: *In re Bridport Old Brewery Company*; *In re Imperial Bank of China.*

In the case of the *Irrigation Company of France*, the circumstances were somewhat peculiar. As Lord Justice *Mellish* observed (6), Mr. *Fox* himself (the Petitioner for a compulsory winding-up or supervision order) had taken various proceedings which could only have been taken on the assumption that the company was in liquidation. It was assumed by the Court that there had been long acquiescence.

(1) Law Rep. 4 Ch. 20, 25, 26, 27.
(2) Ibid. 2 Ch. 191.
(3) Ibid. 1 Ch. 339, 347.
(4) Law Rep. 6 Ch. 176, 190.
(5) Vol. ii. pp. 381–383.
(6) Law Rep. 6 Ch. 190.

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In this instance the winding-up resolutions (supposing them good) were passed on the 12th of April and 9th of May, 1865, and on the 16th of May, 1866, the Petition was presented on which the winding-up order was made. When, then, did the winding-up commence? If on the 16th of May, 1866 (sect. 84), why was not the Court asked, under sect. 146, to adopt the proceedings in the voluntary winding-up? It was necessary that the Court should have been so asked, or why was the section passed?

The Court never has, in fact, adopted the proceedings of these so-called liquidators; and has not even made a supervision order, which would have had the effect of an adoption.

Either, then, these persons were not liquidators at all, in which case our right to have an absolute transfer is clear: *Weston's Case* (1); or if they were liquidators, they had no right to annex this condition to their sanction of the transfer under sect. 131. The consequence of annexing such a condition would be this: The Plaintiff *Cleve*, not being a contributory, is merely charged in aid of the transferee. That is, not only are we being sued for moneys that may not be wanted, but we are being sued for moneys in which, when paid, our transferee will have a right to participate. No one but members of the company can be lawfully made to contribute to the debts of the company. On the 16th of May, 1866, the Plaintiff *Cleve* had long ceased to be a member.

The powers of liquidators to make calls are, by sect. 133, subsect. 9, limited to contributories; the powers of an official liquidator are much more extensive: sect. 95. The effect of a mere voluntary winding-up resolution appears from *In re East of England Banking Company* (2); and a case in which liquidators were held to have unduly exercised their powers under the 131st section, by purchasing from a shareholder under the 161st, occurs in *Vining's Case* (3).

The delay (sect. 35) to register the transfer is another ground on which Mr. *Cleve* is entitled to relief: *Nation's Case* (4); *Read's Case* (5); and though that was against directors, it is to be re-

(1) Law Rep. 4 Ch. 20.
(2) Ibid. 14.
(3) Ibid. 6 Ch. 96.
(4) Law Rep. 3 Eq. 77.
(5) 15 W. R. 631; 36 L. J. (Ch.) 422. W N (1867) 114

membered that under a voluntary liquidation corporate functions remain.

Voluntary liquidators may refuse to transfer altogether; but they cannot give a conditional sanction, for by the very section itself (sect. 131), any alteration in the *status* of the members of the company is to be void.

Independently of that, in this instance the whole transaction, including not merely the amalgamation, but the voluntary winding-up, has been ripped up and undone: *In re Bank of Hindustan, Ex parte Alison* (1), *Bank of Hindustan* v. *Alison* (2), and *In re Bank of Hindustan, Campbell's Case* (3).

Even if we are liable at all, we are not so for the full amount claimed in the action, if, as is said, the official liquidators have funds to return to the contributories.

Mr. *Kay*, Q.C., and Mr. *Robinson*, for the company:—

The meaning of the 131st section is clear. Either immediately before or after a winding-up order a man may contract to sell his shares, but the transfer, unless made with the sanction of the liquidators, is absolutely void; that is to say, a man may sell, but the liquidators are empowered to retain their hold upon the seller. In these particular cases, *Williams* contracted to sell on the 8th of May—the winding-up resolution was confirmed on the 9th; but *Williams* did not execute a transfer till the 25th, nor *Cleve* till the 30th of May, considerably after the winding-up. This was, at any rate, a *de facto* voluntary winding-up; it has never been set aside or superseded, except by the winding-up order. In that state of things, there being a *de facto* winding-up, the deeds were sent in for registration. The liquidators refuse to register, *i.e.*, refuse to sanction the transfer, except upon terms. The transferors were at their mercy, and having obtained their consent upon terms, they now turn round and repudiate these terms.

When the voluntary winding-up came to be superseded by the compulsory order, it did not follow that all the intermediate acts and proceedings were invalidated: sect. 67.

These deeds were a contract between the Plaintiffs and the

(1) Law Rep. 15 Eq. 394. (2) Law Rep. 6 C. P. 222
(3) *Post*, p. 417.

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Defendants *Collum* and *Key;* and the Court has never set aside a contract except upon the terms of putting the parties back again exactly as they were: *Clarke* v. *Dickson* (1). Even in cases of fraud the deed is not set aside if the parties cannot be reinstated: *Deposit Life Assurance Company* v. *Ayscough* (2); *Nicols' Case* (3); *Mixer's Case* (4).

Supposing there had been fraud, there was a remedy under the 138th section.

Campbell's Case (5) shews conclusively that a voluntary liquidation is valid until it has been set aside by a Court of competent jurisdiction. At the very utmost it is only voidable, and, if so, will be set aside only on terms of *restitutio in integrum.*

That the effect of insisting upon a guarantee is to create a new class of contributories, is a most extraordinary fallacy.

As to "delay" in registering the transfer, the cases are collected in *Buckley* on the *Companies Acts* (6).

The history of the company shews that they knew they must either amalgamate or be wound up. This sufficiently accounts for the circumstance that this voluntary winding-up was never attempted to be interfered with or set aside till the compulsory order was made.

Mr. *Eddis,* Q.C., and Mr. *Kekewich,* for the Defendants *Collum* and *Key,* cited *Ogilvie* v. *Currie* (7); *Henderson* v. *Lacon* (8); *Ship* v. *Crosskill* (9).

Mr. *Everitt,* for the Defendant *Walford.*

Mr. *Higgins,* in reply.

SIR JAMES BACON, V.C., having read the first paragraph of the prayer of one of the bills, continued:—

That is the whole case that I have to dispose of. I do not mean to say that any of the arguments have been misplaced, or that

(1) E. B. & E. 148; 4 Jur. N.S. 837.
(2) 6 E. & B. 761; 2 Jur. N.S. 812.
(3) 3 De G. & J. 387; 4 Jur. N.S. 205.
(4) 4 Ibid. 575.
(5) *Post,* p. 417.
(6) Pages 79, 80.
(7) 37 L. J. (Ch.) 541.
(8) Law Rep. 5 Eq. 249.
(9) Law Rep. 10 Eq. 73.

they have been too long, because, of course, parties have a right to manage their own cases in their own way, but I say that my duty is only to ascertain whether, upon this record, the suggestions contained in the prayer (and they are also to be found in the shape of allegation in the bill) are sustained, and I look in vain for any ground which can induce me to believe that these deeds were obtained without consideration. The consideration is not only plainly stated on the deed, but it is plain in itself. The Plaintiff was the registered proprietor of certain shares. He was under liability in respect of those shares, and he desired to shift that liability on to the shoulders of another man. He asked the persons who had the power to consent to his transferring his shares to permit him to do so. In the discharge of their duty they refused to permit him to do so, except upon the terms that the interests of the company which they were to protect, and which was then in the course of winding up, should not be prejudiced by the transaction, and upon the stipulation that the Plaintiff would make their plight no worse and the rights of the company no less than they were at that time. Upon these terms they did consent to his making the transfer. That is said to be a transaction without consideration. In my opinion there never was a plainer consideration, nor a more reasonable one in point of a business-like transaction than existed in this case.

It is said that the deeds were also procured by misrepresentation and concealment; but of neither the one nor the other is there a trace of evidence in the case. There is no misrepresentation as alleged, and no concealment as said to have been practised. With respect to Mr. *Williams*, neither one nor the other can be truly alleged, for he was himself a party to the meeting which preceded the resolution by which the company agreed to wind up first and amalgamate afterwards, or rather to amalgamate when they were wound up. Therefore knowledge on the subject he seems to have had perfectly. What degree of knowledge Mr. *Cleve* had does not seem quite so distinct; but at least I have no reason to doubt that Mr. *Cleve* knew, and to say that anybody misrepresented any fact to him, or that any fact was concealed from him, is to say what the evidence in support of the allegation does not justify me in adopting.

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The third ground is, that the Plaintiff was induced to execute by the unlawful threat of retaining his name on the register of shareholders. First, there is no evidence of any threat having been used. Cases were referred to from *Smith's* Leading Cases, and many others no doubt might be found, in which a man, who has been induced under what is called "pressure" to enter into an engagement, has a right to be relieved in this Court; but then, as Mr. *Bradford* read to me from the case, that must be where a man has no alternative. Not only is there no suggestion of any threat having been used, but it is inconsistent with the case that any threat should have been used; and I am asked to say that the Plaintiff had no alternative but to comply, when it is quite plain the law was open to him. If the liquidators had made an unreasonable request, he was not bound to comply with it—he might then have resorted to his legal rights, if he had any—and he might have said, "I am entitled to transfer these shares." That clause in the Act of Parliament which gives that right was referred to in the course of the argument, and perfectly distinct and plain it is. If, on the day when he executed the deed, his case was what it is said to be now, there is no suggestion that he was under any pressure whatever. He was under the inducement that, by shifting the present burden from his own shoulders to those of *Demetrio Pappa* or somebody else, he might get a collateral security—a chance at least—if no more, that that which he did owe or might owe to the company would be paid by somebody else. That is called "a threat." Now, treating this case, as I can only treat it upon this record, as an application to that ancient jurisdiction of the Court—hitherto an exclusive jurisdiction—how long it may remain exclusive the future alone can tell—I mean the right to be relieved on the ground of equitable considerations against obligations which by their tenor and effect are legally enforceable—treating it as an application under that old familiar head of equity, in my opinion it fails on every point and in every respect.

But it would not be right, after the lengthened arguments I have listened to, to part from the case without some observations upon those arguments, although the decision, as far as I am concerned, must be that which I have stated. Reference was made

copiously to the Act of 1862. It was argued that the notice convening the meeting was not a proper notice; and, even if it was, that the resolutions come to there were unlawful resolutions. In my judgment there is no foundation for either of those suggestions. The notices are distinct and explicit; answering the only purpose for which they were issued, viz., to inform the shareholders to whom they were addressed what was the purpose of the meeting then to be called. They contain, no doubt, reference to two things—an amalgamation of this company with the other, which amalgamation has been decided to be unlawful—and a suggestion that this company should be wound up. And because these two things occur in one notice it is said that they are both unlawful; that because one is unlawful the other must also be unlawful. I am unable to follow that reasoning. I think it would have been perfectly competent to the company, after those resolutions were passed, to forego their intention of amalgamating and yet to hold to their determination of winding up; and, although it is not necessary to take the point into consideration, there are abundant reasons why, whether they amalgamated or not, this company should be wound up. The suggestion that the notice is bad in my opinion cannot be supported.

Then it is said that this is *res judicata*, for that the Lord Justice *Turner* decided, in the case of *In re Imperial Bank of China* (1), where there were resolutions very similar to the present, that if a notice for one purpose was bad, or if the resolution comprehended two purposes, one of which was bad, they all fell together; that if one could not be accomplished the other became futile. Well, there are expressions, no doubt, in the judgment of the Lord Justice (of whom I speak with the utmost veneration and respect) which seem to justify that conclusion. And the same thing may be said of a great many other judgments, well considered and well expressed, from which a part of a sentence or a piece of a line may be extracted so as to sustain anything that is desired to be founded upon it. The Lord Justice did say in that case, no doubt (2), "If the resolutions for the voluntary winding-up of this company had stood apart from the amalgamation, I should

(1) Law Rep. 1 Ch. 339.

(2) Law Rep. 1 Ch. 347.

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have thought that the Petition ought to have been dismissed upon this point also; but the resolutions for winding up the company voluntarily, and for amalgamation, are plainly parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it; and if it cannot stand as to either, the Petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily." That is the passage which was quoted in support of the Plaintiff's case. But when the case comes to be examined, although those expressions did fall from the learned Judge, he adopts the voluntary winding-up as an existing thing, treats it as an existing thing, which was and had been an existing thing until the compulsory winding-up order was made. The conclusion of the judgment is, that the Petitioners were to be at liberty to make out a case if they could for a compulsory winding-up, which order, if it was made, would supersede the voluntary winding-up order. And that is the whole scope of the judgment. In my opinion, notwithstanding the passage which I have read, and it is the strongest that can be found in that case, the decision does not in the slightest degree support the notion that because a company, at a duly convened meeting, having in their contemplation two objects, one of which they could accomplish, and the other they could not, resolve to do both, they cannot do either, because they cannot do one. It is a strange sort of reasoning, and I am quite sure that, looking at the case and the ultimate judgment upon it, that cannot have been the decision of the learned Lord Justice *Turner*. There is no ground that I know of upon which it can be said that the business of joint stock companies should be so hampered and interfered with as that, after they have come to a resolution to wind up, upon a mere cavil, upon mere special pleading, upon mere spelling out of bits of Acts of Parliament, and more or less of judgments upon other subjects, their deliberate and serious resolutions shall be interfered with, and the transactions of years shall be undone.

Then it is said that *Clinch* v. *Financial Corporation* (1) has disposed of this, and that it is now *res judicata*. Now, that

(1) Law Rep. 5 Eq. 450; Ibid. 4 Ch. 117.

contention deserves every attention, because it was asserted very positively. *Clinch's* case was this: there had been a resolution to amalgamate, and there had been also a resolution to wind up. The Plaintiff in that case did not trouble himself in the slightest degree with the resolution to wind up. He made parties to his bill the two sets of directors who were parties to the amalgamation, and he prayed by his bill that it might be declared that the arrangement which had been come to between the directors of the corporation and the directors of the bank for an amalgamation of the two companies, was beyond the power of the directors of the corporation, and not authorized by the articles of association of the corporation, and that such arrangement was not binding upon the Plaintiff nor upon any member of the corporation. The bill also prayed for a declaration that the resolutions were not within the powers of a general or any other meeting, were not authorized by the memorandum or articles of association, and were not binding on the Plaintiff or any other dissentient member of the corporation. It is impossible to understand that without reference to the previous passage which I have read, because the arrangement for amalgamation was the only thing then in contemplation, and it could not have been said that the resolutions were not within the powers of a general or any other meeting; for the Act of Parliament plainly provides for the passing of such resolutions. It is one of the incidents to a corporation of this sort. But reading it as it ought to be read, by reference only to the arrangement of the amalgamation, then it is perfectly consistent and right. It asked, further, a declaration that the resolutions were void for want of due confirmation. Then it alleged misrepresentation and concealment. Then it asked a declaration that such an agreement for amalgamation as aforesaid was null and void by reason of the variation between the terms in the statement and the circular, and that the corporation and directors might be restrained from carrying into effect the proposed amalgamation, and that the liquidator might be restrained from parting with the assets of the bank.

The issue then between the parties there was this: that the Plaintiff complained only that the amalgamation should be allowed to subsist; because, although the case was heard, as it seems, at great

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length, the decree does not go one step beyond the prayer of the bill. It does not pronounce anything as to the validity of the winding-up order, although the winding-up order had then been long in operation. The Court did declare (and this is in the very terms of the prayer of the bill) that the arrangement in the Plaintiff's bill mentioned as come to between the directors of the corporation and the directors of the bank for an amalgamation was beyond the power of the directors of the corporation, and was not authorized by the articles of association, and that such arrangement was not binding on the Plaintiff, nor on any of the members, nor on the shareholders. And it declares further that the resolutions were not within the powers of the general or any other meeting of the corporation, that they were not authorized by the memorandum and articles of association, and that the same were not binding on the Plaintiff or any other dissentient member of the corporation.

In my opinion it is impossible to read that bill, or the decree, or the printed report to which reference has been made, and to say, with any chance of success, that in *Clinch* v. *Financial Corporation* (1) anything was decided as to the voluntary winding-up. Now, the resolution for voluntary winding-up, therefore, being, in my opinion, properly and lawfully come to, the liquidators were lawfully and properly appointed under that resolution; and for twelve months that resolution was acted upon, and was in full force and operation, and up to this day no attempt has been made to impeach it. There are the means under the Act of Parliament —and, if necessary, by filing a bill in this Court—of setting aside anything that had been done wrongly under that winding-up resolution. No such attempt has been made. A year after an order is made for the compulsory winding-up of this company. Reference is made to a clause, relied upon by the Plaintiff, in the Act of Parliament (the 146th section, I think), under which—an order for compulsory winding up being made—the Court may, if it think fit, adopt anything that has been done under a winding-up order. It has been argued as if the effect of that was to nullify, to abrogate, everything that had been done under the voluntary winding-up. Not only do the words not justify any such conclusion, but it is im-

(1) Law Rep. 4 Ch. 117.

possible to impute to the Legislature the intention of so acting on, or so dealing with, a voluntary winding-up and the transactions which have taken place under it. The Court may say, upon a proper case being submitted to it, that a transaction may be inchoate. Expenses may have been incurred from the commencement of it, and more expenses may be necessary to conclude it. The official liquidator appointed under the compulsory winding-up order is, under the authority of the Court, to take the matter up in the unfinished state in which he finds it and complete it. That, and that only, or cases like that, are those which are intended to be reached by that clause of the Act of Parliament to which I have referred.

Well, then, what else is there? I have already said that the notion that the liquidators were not at liberty to exact—if that word is properly used—these terms is, in my opinion, wholly unfounded.

What was the duty of the liquidators under the winding-up order? To protect the property of the company by all the means in their power. That was their first duty, whether expressed in the Act of Parliament or not; and any violation of that duty would fix them with responsibility. When they are asked to permit a transfer which, by the very terms of the Act, cannot take place unless they sanction it, they say, "Very well, if it is convenient to you, you may transfer. You may get anybody else to undertake to pay what you do owe, or may owe; but we will not let go the hold we have upon you now, and we will only let you transfer on the terms that you will keep us in as good a condition now as we should be if we did not let you transfer."

That is said to be in excess of the powers of the liquidators. In my opinion the liquidators have acted with perfect propriety, and it seems, in point of fact, not without due deliberation, and not without taking advice upon the subject, although that, of course, would not make good anything which was in itself wrong. It is worthy of notice that the liquidators acted with a due exercise of the discretion placed in them, and they insisted that before these gentlemen should slip their necks out of the noose, they should undertake to come back and put themselves in that place again if the man to whom they transferred—*Demetrio Pappa* or

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anybody else—should fail to perform the obligations incident to the transfer of the shares.

Something has been said about delay. An argument was attempted, but dropped afterwards, that from the time when the shares were sent in for registration there had been such a delay in effecting the transfer as that the Plaintiffs were entitled to consider that the transfer had been sanctioned. That, in my opinion, is not to be sustained. The directors, notwithstanding the terms of the resolution to which my attention was called, had lost all power in the face of the Act of Parliament. If the directors had been ever so willing that these gentlemen should transfer, they could not transfer without the sanction of the liquidators, and there is no pretence for saying that there is any proof of any application being made to the liquidators, and of that application being neglected, or postponed, or delayed so as to prejudice the rights of the Plaintiffs.

Now I believe I have gone through the several topics which were urged in argument in favour of the Plaintiffs; and although, as I have said, I could not pass them over without notice, I do not think that any one of them is of the slightest force, if indeed it were properly raiseable upon this record, which, in my judgment, it is not. If the Plaintiffs had any right to complain—not of the amalgamation, for that is gone, but—of the winding-up order, or anything done under it, while it remained a vital winding-up order unimpeached, and before the compulsory order was made, they were at perfect liberty to try that. They come into Court with a bill addressed to the jurisdiction which the Court has to give relief against fraudulent legal instruments. They allege they were threatened into the execution of them; and not only do they not prove it, but the contrary is proved. They say it was without consideration; that is wholly unproved. They say it was effected by means of concealment and misrepresentation, and there is not a trace of such misrepresentation or concealment. In my opinion in every respect the case of the Plaintiffs fails. Nothing can be done upon these bills—both of them, for there is no distinction in this respect—but to order that they shall both be dismissed with costs, including the costs of the action at law and of the special

jury, with leave to issue execution on the judgment, and liberty to the Plaintiffs to make application in Chambers in the winding-up to reduce the amount. As against the co-Defendants the bill will be simply dismissed with costs.

[A similar order was made in both suits.]

Solicitors for the Plaintiff *Cleve:* Messrs. *Tindale & Grove.*

Solicitors for the Plaintiff *Williams:* Messrs. *Rooks, Kenrick, & Co.*

Solicitors for the Company: Messrs. *Argles & Rawlins.*

Solicitors for the Defendants *Collum* and *Key:* Messrs. *Loxley & Morley.*

Solicitors for the Defendant *Walford:* Messrs. *Sharp & Turner.*

BLOOMER *v.* UNION COAL AND IRON COMPANY.

[1873 B. 217.]

Company—Borrowing Powers—Mortgage of Book Debts.

Under a power to raise money by mortgage, with or without power of sale, of any of the property of the company, book debts of the company not yet accrued due may be validly charged.

20 L.T. 339

DEMURRER.

The bill stated the incorporation of Defendant company, in 1867, under a memorandum and articles of association, by which (Art. 59) the directors were empowered as follows:—

"Without limiting the general authority by this or any preceding section given to the directors, they shall have the following specific powers, namely, they may, for the purposes of the company, draw, accept, make, or endorse, or authorize the drawing, accepting, making, or endorsement of any bill of exchange, promissory note, or other negotiable instrument, and may borrow on behalf of the company, from any one or more of the directors or members, or any other person or persons, company or companies, any sum or sums of money, either by way of mortgage (with or without a power of

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sale) of any of the property of the company, or on bonds, debentures, or otherwise, as they may see fit."

In 1870 the directors of the company, by virtue of their powers, borrowed from the Plaintiffs the sum of £3000, which was secured by debentures, payable on the 1st of January, 1874, and bearing interest at the rate of 7½ per cent. per annum, and also by an indenture dated the 31st of December, 1870, by which the company conveyed to Plaintiffs "all the lands, mines, works, plant, machinery, stock-in-trade, book debts, rents, profits, and other property of every description which the company then had, or might during the continuance of that security acquire, except that part of the capital of the company which was not then paid up, and except such leasehold property as the company were prohibited from assigning without license.

The debentures and the mortgage deed were duly registered according to the provisions of the *Companies Act*, 1862.

In 1872 it was resolved that the company should be wound up voluntarily, and one *Smith* was appointed liquidator.

The Plaintiffs having applied to the liquidator and the company for payment of the moneys which had been advanced upon the security of the said debentures, they refused, on the ground that the only available assets in their hands for that purpose were (as the fact was) the book debts of the company which had accrued due since the date of the said mortgage security.

The bill prayed for an account of principal and interest due to the Plaintiffs under these securities, and for a declaration that the said book debts of the company were liable under the mortgage securities for payment to the Plaintiffs of principal and interest, in priority to payment of the unsecured debts of the company.

To this bill the Defendant company had demurred, on the ground that the directors had no authority to mortgage these book debts.

Mr. *Plumptre*, in support of the demurrer:—

Under the power to charge the property of the company the directors could only charge that which was actually existing, in the shape of property which could be transferred or assigned, con-

veyed or surrendered, and not book debts, or, at any rate, not book debts thereafter to accrue due, which stand upon the same footing as the proceeds of a future call, and cannot be validly mortgaged: *In re Sankey Brook Coal Company* (1); *Ex parte Stanley* (2).

Mr. *Underhill*, for the bill, was not called on.

SIR JAMES BACON, V.C.:—

Book debts are property of the company. The demurrer must be overruled.

Solicitors: Mr. *H. G. Field*, for Messrs. *H. & J. E. Underhill, Wolverhampton;* Mr. *W. H. Bishop.*

(1) Law Rep. 10 Eq. 381. (2) 33 L. J. (Ch.) 535.

C. J. B.
1873
June 16.

Ex parte JONES. *In re* JONES.

Composition—Examination of Debtor—Jurisdiction of Court—Fraud—Delay—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

After the creditors of a debtor have resolved to accept a composition, and the resolutions have been registered, the Court has jurisdiction, if a dissentient creditor makes out a *primâ facie* case of fraud on the part of the debtor, to order him to be examined as to his affairs.

Ex parte Levy (1) explained.

THIS was an appeal from a decision of the Judge of the County Court at *Aberystwith*.

John Jordan Jones, who was an auctioneer and farmer at *Rhydygof* and at *Lampeter, Cardiganshire*, on the 26th of March, 1872, filed a liquidation petition. His statement shewed that his debts amounted to £6625 7*s.* 2*d.*, of which £4746 2*s.* 4*d.* were unsecured; and that his assets available for the payment of his unsecured debts were—

	£	*s.*	*d.*
Book debts, £2038 8*s.* 9*d.*—Estimated to produce . .	41	17	10
Cash in hand	1	5	0
Furniture, fixtures, &c. . .	10	14	0
Other property	40	4	0
Surplus from securities . .	95	0	0
Total	£189	0	10

The first meeting of creditors took place on the 23rd of May, and was attended by thirty-one creditors, whose debts amounted to £4075 1*s.* The creditors present resolved, by the statutory majority, to accept a composition of 6*d.* in the pound in satisfaction of the debts due by *Jones*, which was to be paid at the expiration of six months from the date of the second meeting of the creditors, and *John Hughes* was appointed trustee. Of the thirty-one creditors present, twenty-six voted; eighteen for the resolutions, and eight against them. The debts of the eighteen creditors amounted to

(1) Law Rep. 11 Eq. 619.

£3287 7*s.* 7*d.*, and the debts of the eight creditors amounted to £756 2*s.* 5*d.* Of the eighteen assenting creditors one only, who proved for £941 17*s.* 2*d.*, but whose debt was disputed, attended the meeting in person. The other seventeen were all represented by the debtor's solicitor as their proxy. The second meeting of the creditors was held on the 5th of June, and the resolutions passed at the former meeting were confirmed. Twenty-two creditors attended the second meeting, of whom three attended in person, the remaining nineteen being represented by the debtors' solicitor as their proxy. The resolutions were afterwards duly registered. On the 7th of December, *John Morgan*, a creditor for £121, who had voted against the resolutions, gave notice of an application to the Court for an order to examine the debtor, and all other necessary parties, and to set aside the proceedings for liquidation or composition, on the ground that the debtor's statement did not disclose the real state of his affairs on the 26th of March, 1872, but that it was fraudulent and untrue, and intended to deceive and defraud his creditors, and that the claims of some of the persons who voted as creditors at the meetings were not for *bonâ fide* debts, but were fictitious claims got up by collusion with the debtor, and that the composition was disproportioned to his means of payment. In support of this application *Morgan* filed an affidavit in which he deposed to various facts (many of them only as to his information and belief), such as that shortly before he filed his petition the debtor had removed from his farm his farming stock and other property, worth £1000, and that they were afterwards brought back; that the debt proved by one of the creditors, named *John Jones*, for £1022, was not due to him, only £200 being in fact due to him, as he had himself told *Morgan* in a conversation which they had in April, 1872; that a letter had been received by the Registrar of the Court from a brother of the debtor, who was also a creditor who had proved for £991 16*s.* 10*d.*, stating that the debtor was well able to pay everybody if he liked, and that he (the brother) had instructed his proxy (the debtor's solicitor) to vote at the meeting in favour of liquidation; that the book debts must have greatly exceeded £41 17*s.* 10*d.* in value; and that the equity of redemption of the real estate exceeded by many hundred pounds the debtor's estimate.

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In answer to this the debtor filed an affidavit in which he denied all the allegations made by *Morgan*, and an affidavit was also filed by his solicitor denying the statements contained in the letter of the debtor's brother. Upon this evidence an order was made in the County Court that the debtor should attend and be cross-examined on his affidavit. From this order the debtor appealed to the Chief Judge. Before the hearing of this appeal it was objected, on the part of the debtor, that the Court had no jurisdiction to order the examination, as the resolutions had been duly passed at the meetings of the creditors, and also that there had been undue delay by *Morgan* in making the application. The Chief Judge, on the 24th of March, 1873, made the following order:—"That it be referred to the County Court to re-hear the application of *John Morgan*, and to state whether, in the opinion of the Court, such a sufficient case had been established by the said *John Morgan* as to require a further investigation, and also to decide upon the objection as to the jurisdiction of the Court, and as to the delay by the creditor in making the application; and that the appeal motion do stand adjourned, with liberty to the applicant to apply again to this Court if he shall be so advised." The motion was re-heard in the County Court on the 19th of April, and the following order was made:—"This Court is of opinion, and doth certify to His Lordship the said Judge of Appeal, that a sufficient case has been established by the said creditor to require further investigation; and that the objections raised to the jurisdiction of this Court, and as to the delay of the said creditor in making his said application, are invalid." The appeal was now brought on again for hearing.

Mr. *Robertson Griffiths*, for the Appellant:—

This being a case of composition, the Court has no jurisdiction to order the examination of the debtor after the resolutions have been passed by the creditors and registered: *Ex parte Levy* (1). Moreover, delay of itself is a bar to the application: *Ex parte Banfield* (2); *Ex parte Savin* (3). The only evidence in support

(1) Law Rep. 11 Eq. 619. (2) Law Rep. 1 Ch. 154.
(3) Law Rep. 1 Ch. 616.

of the application is that of the applicant himself, and in most cases he swears only as to his information and belief.

Mr. *Winslow*, for the creditor, was not called upon.

SIR JAMES BACON, C.J.:—

All I had to do when the appeal was before me on the former occasion was to refer the case back to the County Court Judge, that he might exercise his discretion and decide whether the delay in making the application had been accounted for to his satisfaction, and whether the evidence was sufficient to enable him to proceed in the matter without further investigation. He thought that the delay was accounted for, and that, considering the conflicting statements which were made, it was necessary that the matter should be further investigated. I have only now to decide whether the County Court Judge, in the exercise of his undoubted discretion, has done right in certifying to this Court as he has done. Mr. *Griffiths* has argued that the delay that has occurred is of itself an answer to the application, and he has also raised the objection that the Court has no jurisdiction to make the order. With regard to the question of jurisdiction, I have before now pointed out the difference which there is between proceedings for liquidation and proceedings for composition. In the latter the debtor's own word is taken as to the amount of his assets. But if he should state his assets as £180, for instance, when they were really worth £1800, no doubt this would be a fraudulent proceeding, and the creditors would not be bound. With regard to the delay, that is a matter which deserves and demands the attention of the Court. In *Ex parte Banfield* (1) an attempt was made to rescind the registration of a deed after it had been long acted upon, and after rights had been determined under it, and the Court refused to allow this to be done. In *Ex parte Savin* (2) the objection raised was at the best an equitable one to the registration of the deed. It was objected that the descriptions of some of the creditors were insufficient—that some of them were described simply as "of *Manchester*." But a great deal had taken place under the deed,

(1) Law Rep. 1 Ch. 154. (2) Law Rep. 1 Ch. 616.

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important engagements had been entered into, and the Court held that the time which had elapsed before making the application was fatal to it. These cases were quite different from the present; nor has the decision in *Ex parte Levy* (1) any application. All that was decided there was that the Registrar had no power to direct an examination of the debtor to take place when the parties came before him to register the resolutions which had been passed by the creditors. The examination ought to have been demanded at the meeting of the creditors, and at any rate no harm could be done by registering the resolutions. I think, therefore, that the County Court Judge has come to a proper conclusion in saying that, having regard to the circumstances in this case, there has been no unreasonable delay in making this application. The statement filed by the debtor shewed that his assets were £189 and his debts over £6000. A creditor complains that neither the assets nor the debts are properly stated. He says that the debtor has been guilty of deceit, and that the composition offered bears no reasonable proportion to his means. It is said that these charges depend entirely upon the unsupported affidavit of Mr. *Morgan*. But the present question is, whether he has made out a sufficient *primâ facie* case for a further investigation. If his application is granted, he can examine the debtor, and if it is necessary that he should adduce further evidence, he must do so. But when the debtor merely denies the charges made against him, and adduces no contradictory evidence, I cannot hold that the *primâ facie* case against him is displaced. If the creditor can establish the case which he alleges, it would be a crying injustice that the law should enable a man to defraud his creditors to the extent of £5000, by paying them 6*d.* in the pound. I do not say that is so here, but the debtor is refusing to answer questions which the creditor has a right to put, and it is in the interest of justice that the inquiry should be prosecuted. Of all persons in the world the debtor has the least reason to say, The Court shall take my assertion as positive proof of the facts which I assert. This appeal has been brought from a wrong point of view. If I were called upon to decide the merits of the case upon the conflicting statements

(1) Law Rep. 11 Eq. 619.

now before me, I should have great difficulty in doing so. But I am not called upon to express any opinion upon the merits now. This appeal is a total mistake, and it must be dismissed with costs.

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Solicitors for the Appellant: Messrs. *Paterson, Snow, & Burney*, agents for Mr. *Griffith Jones, Aberystwith.*

Solicitors for the Respondent: Messrs. *Jones, Blaxland, & Son*, agents for Mr. *J. J. Atwood, Aberystwith.*

Ex parte LONDON AND COUNTY BANKING COMPANY. *Ex parte* TRICKETT. *In re* BROWN.

C. J. B. 1873 *July* 14.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Power of Court to review Order—Order varied after expiration of time for Appealing—Appeal from Substituted Order—Bankruptcy Rules*, 1870, *r.* 143—*Fraudulent Preference —Pressure.*

On the 17th of February, 1873, an order was made in the County Court that a charge on certain property given by a bankrupt to his bankers on the 24th of February, 1872, was void as against the trustee, and that a prior charge given on the 6th of January, 1872, was valid to the extent of £2500. Liberty was reserved to either party to apply to rescind or vary this order on or before the 31st of March, 1873. On the 31st of March, on the application of the trustee, this order was varied by declaring that the bank's charge extended only to a part of the property comprised in the two documents in question. This substituted order did not expressly declare the charge of the 24th of February to be void. On the 5th of May, 1873, the order of the 31st of March was again varied on the application of the bank, and an order was made declaring the charge of the 24th of February void as against the trustee.

From this order the bank appealed:—

Held, that the Judge of the County Court had full power, under sect. 71 of the Act, to review his order of the 31st of March, and that consequently the appeal was not out of time:

Held, also, that the charge of the 24th of February, having been given at the request of the bank, did not amount to a fraudulent preference.

THIS was an appeal from a decision of the Judge of the County Court at *Croydon.*

Joseph Brown was a contractor carrying on business at *Croydon*

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and also at *Deptford, Kent.* On the 10th of May, 1872, he filed a liquidation petition in the *Croydon* County Court, and ultimately, on the 23rd of September, he was adjudicated a bankrupt upon a creditor's petition, founded upon the filing of the liquidation petition, and on the 22nd of October *Samuel Trickett* was appointed trustee of the estate. Prior to the filing of the liquidation petition *Brown* had entered into a contract with the *Greenwich* District Board of Works for the construction of some sewers.

In November, 1872, this contract had been completed, and there was a considerable balance due from the board to *Brown.* On the 5th of November the trustee gave notice to the board to pay this balance to him. The *London and County Banking Company,* with whose branch at *Deptford* the bankrupt had kept an account, claimed a lien upon the balance under the following circumstances:—

In February, 1872, the bankrupt's account with the bank was overdrawn to the extent ot £3444 5*s.* 11*d.* On the 24th of February, 1872, he gave the bank the following document:—

"*Deptford,* 24th February, 1872.

"To the *London and County Bank.*

"Gentlemen,—In consideration of your giving me time for the payment of the sum of £3444 5*s.* 11*d.*, in which I am this day indebted to you, I hereby assign all moneys due and to become due to me from the Board of Works, *Greenwich* District, in respect of my contracts with them for paving, sewers, or other works, and I hereby charge such moneys with the payment of the above-mentioned sum, or any part thereof that may at any time be due from me to you.

"(Signed) *Joseph Brown.*"

Notice of this charge was the same day given to the district board. Mr. *Norfolk,* a registered public officer of the bank, deposed that the letter of the 24th of February was signed by *Brown* at his instigation, and, in answer to this, *Brown* deposed that on the 23rd or 24th of February, 1872, he received a letter from Mr. *Day,* the manager of the *Deptford* branch of the bank, asking him to call upon him, but without assigning any reason for his doing so. *Brown* deposed that at this time he was hopelessly insolvent, and that his account with the bank had been overdrawn for many

months. He called on Mr. *Day* on the 24th of February, at the *Deptford* branch, and saw him and another gentleman, whom he believed to be an accountant from the head office, and Mr. *Day* requested him to sign the letter of the 24th of February, which had been already written out. He read it over, and considering there was nothing in it but what was quite proper he signed it. He said that he did not ask Mr. *Day* to give him time, nor did Mr. *Day* promise to do so, nor was he pressed to sign the document, nor was he under any fear or threat of legal or other proceedings by the bank. In reply to this evidence Mr. *Norfolk* made an affidavit reiterating the statement previously made by him as to the signing of the letter of the 24th of February, and he added, "The giving of the said charge was a proceeding in continuation only of the accustomed mode of dealing with the bankrupt for many months past, for not only had charges of a similar nature been given, but they had been acted upon over and over again." He specified a number of dates on which these charges had been given. On the 17th of February, 1873, upon a motion on behalf of the trustee, that the district board might be ordered to pay to him the balance due from them to the bankrupt, the Judge of the County Court made an order declaring that the charge of the 24th of February, 1872, was void as against the trustee of the bankrupt's property, and that a prior charge, dated the 6th of January 1872, given by the bankrupt to the bank, was valid as to the sum of £2500 then advanced by the bank, and an order was made that after payment by the district board of the £2500 to the bank, the balance (if any) remaining in their hands was to be paid to the trustee, and either party was to be at liberty to apply to rescind or vary this order on or before the 31st of March, 1873. On the 31st of March an application was made to the Court by the trustee to vary the order of the 17th of February, and a substituted order was made to the following effect: A declaration that the bank had a charge for the amount of the certificates due from the district board to the bankrupt on the 1st of February, 1872, and an inquiry was directed to be made before the Registrar as to the amount of such certificates; and it was ordered that the district board should pay to the bank the amount certified by the Registrar to be due, and it was further ordered that the board should pay to the trus-

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tee the balance after payment of the amount certified to be due to the bank, and it was declared that the charge should not exceed £2500. On the 5th of May, 1873, upon the application of the bank that the order of the 31st of March might be reviewed, varied, or rescinded, an order was made declaring that the charge of the 24th of February, 1872, was void as against the trustee, and that the charge of the 6th of January, 1872, was a valid charge for the amount of the certificates due from the board to the bankrupt on the 1st of February, 1872, and an inquiry was directed before the Registrar as to the amount of the certificates, and it was ordered that the board should pay to the bank the amount to be certified by the Registrar to be due under the certificates, and that they should pay to the trustee the balance (if any) payable from the board, after payment of the amount so certified to be due to the bank. From this order the bank now appealed, and asked that it might be varied or rescinded, so far as it declared the charge of the 24th of February void as against the trustee, and directed the inquiry before the Registrar, and payment to the bank of the amount certified to be due under the certificates, and payment of the balance to the trustee, and that in lieu an order might be made declaring both the charges of the 6th of January and the 24th of February, 1872, valid charges as against the trustee to the extent of the £3444 5*s.* 11*d.*, upon the amount due to the bankrupt by the board at the dates of the charges respectively; and for consequential directions as to an inquiry and payment accordingly. The trustee also presented a cross appeal from the whole of the order of the 5th of May.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the bank:—

The charge of the 24th of February is clearly valid, for it was not given by *Brown* spontaneously, but at the request of the bank: *Ex parte Topham* (1); *Hartshorn* v. *Slodden* (2).

Mr. *Winslow*, for the trustee:—

The whole matter was before the County Court Judge on the 31st of March, and no appeal was brought from the order then made within the twenty-one days allowed by rule 143 of the

(1) Law Rep. 8 Ch. 614. (2) 2 B. & P. 582.

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Bankruptcy Rules, 1870. The application afterwards made, which resulted in the order of the 5th of May, was made really for the purpose of enabling the bank to present an appeal from the order of the 31st of March, after the time for doing so had expired. The rule limiting a time for bringing an appeal cannot be evaded in this way: *Sanderson's Case* (1); *In re Plumstead Water Company* (2); *Carter* v. *Dimmock* (3). The Court has, no doubt, power under sect. 71 to review its own orders, but this must be confined to cases where new matter is discovered after the original hearing, and it cannot be used in order to evade rule 143. With regard to the merits, it is plain from the evidence that there was no pressure on the part of the bank. Therefore the charge of the 24th of February amounted to a fraudulent preference: *Ex parte Simpson* (4); *Ex parte Tempest* (5).

Mr. *De Gex*, in reply:—

Sect. 71 gives ample power to the Court to review any order. The cases cited are distinguishable; they relate to sect. 12 of the *Bankruptcy Act*, 1869, which was much more stringent than is rule 143. As to the merits, a mere request by a creditor is enough to prevent a fraudulent preference: *Van Casteel* v. *Booker* (6); *Strachan* v. *Barton* (7).

Sir James Bacon, C.J.:—

An impression was certainly made upon me at first with regard to the question of time, but on considering the special provisions of the Act of 1869, which by sect. 71 in very unmistakeable terms gives, and means to give, to the Courts power to rehear, rescind, or vary their own orders, I think that the strict enactments contained in the former Acts do not furnish me with any guide to decide the present question; and I think so, moreover, on looking at the terms of the order and attending to the history of this case. There have been several hearings before the County Court. There has been a plain contemplation of rescinding and varying, as appears by the last words of the order of the 31st of March. There was clearly a

(1) 3 De G. & Sm. 66.
(2) 2 D. F. & J. 20.
(3) 4 H. L. C. 337.
(4) De G. 9.
(5) Law Rep. 6 Ch. 70.
(6) 2 Ex. 691.
(7) 11 Ex. 647.

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misunderstanding when that order was made. Then a notice of motion was given on which the order was made out of which this appeal arises. Then I find that the Court entertained the case and examined the evidence that had been given before it, old and new, also the orders that had been made, and of course the order then existing, and without any objection being then raised on the part of the present Respondent. The Court then proceeded to make the order. I think that was regular. I think so, bearing in mind the great danger that might ensue if the practice were permitted that persons who have got orders which have become stale in point of time might come and, under the pretence of a rehearing, get over that wholesome provision which the statute contains, that an appeal properly so called shall be brought within twenty-one days. If I thought there was any such danger, I should pause before saying that the objection on the point of time cannot be sustained.

The case, therefore, is reduced to the ordinary question whether this was a fraudulent preference. *Ex parte Topham* (1), recently decided by the Lords Justices, puts the matter in a very plain form, and in a form which entirely binds me. The statute does not say anything about "pressure," but it does contemplate the case of a man unable to pay his debts with his own money doing an act by which he seeks to prefer one creditor over others. It is the spontaneous act of the debtor which constitutes the offence (if properly called by that name), or the irregularity; and here the evidence is quite plain, that for a year and more before this transaction the *Banking Company* had been in the habit of making advances and permitting the bankrupt to have an open account as a contractor; and everybody knows, as men of business, that such persons require frequent advances; and on the several successive occasions which are mentioned he had given to the bank an order upon his own debtors for the purpose of satisfying the money advanced to himself by the bank. Mr. *Winslow* would read the evidence as if it meant that the charge was given only to secure present advances. I do not take the witness to have said that, nor do I consider that would be consistent with the course of dealing. There has been no attempt to cross-examine

(1) Law Rep. 8 Ch. 614.

this gentleman, no statement on the part of the bankrupt from which I could gather that, in complying with the request, I do not say pressure, but with the request only of the creditors that he would give them an order on the district board, he thought there was anything unusual or unreasonable, or that he had even the slightest intention of preferring one creditor over the others. Unless I were wholly to overrule the decision in *Ex parte Topham* (1), I must say there is no case of fraudulent preference proved here, and that the *Banking Company* are entitled to have that part of the order discharged which declares that the charge made on the 24th of February was void.

Solicitors for the Bank: Messrs. *Stevens, Wilkinson, & Harries.*
Solicitors for the Trustee: Messrs. *Lewis, Munns, & Longden.*

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Act of Bankruptcy—Assignment of whole Property for a past Debt—Fraudulent Preference—Limit of Three Months before Bankruptcy—Purchaser in Good Faith, and for Valuable Consideration—Issues of Fact found by a Jury—Power of Court to disregard them—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2, *ss.* 72, 92, 94.

On the 6th of June, 1871, *G.*, a dealer in oil, borrowed £400 of *N.*, his brother-in-law, the money to be repaid in a month. The money not having been repaid when due, *N.* pressed for it, and ultimately placed the matter in the hands of his solicitors, who gave *G.* till the end of July to pay. On the 1st of August *G.* asked *N.* for further time, and *N.* said he must have a speedy settlement or he should take proceedings. *G.* said he would do what he could during the week. On the 5th of August he went to *N.*, and said he had no money, but that he had some oil, and that if *N.* could induce a firm of *B. & Co.*, in which he had formerly been a partner, to buy it, he should be paid out of the proceeds. *N.* went to *B.* and explained the circumstances to him, and ultimately *B.* consented to treat with *G.* *G.* then went to *B.*, and, in the result, a contract was entered into by *B.* on behalf of his firm to buy fourteen casks of oil from *G.* At this time *G.* had, in fact, no oil, but on the 9th of August he ordered fourteen casks from *W.* on credit, and this oil was by *G.*'s direction sent to *B. & Co.* *G.* never paid for it, and had no means of doing so when he ordered it. On the 15th of August *G.* called at the warehouse of *B. & Co.* to settle the purchase, and by his order

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B. & Co. paid to *N.* the amount of his loan and interest, and paid the balance of the price of the oil to *G.* On the 6th of April, 1872, *G.* was adjudicated a bankrupt, the act of bankruptcy being the filing of a petition for liquidation on the 7th of March. The trustee afterwards applied to the County Court to set aside the payment of the £400 to *N.* as a fraudulent preference and an act of bankruptcy. The case was tried by a jury, who found that when the transaction took place the oil was substantially the whole of the bankrupt's property; that to the knowledge of *N.* he was insolvent; and that the transfer was not made *bonâ fide*, but fraudulently without pressure, with a view of giving *N.* a preference over the other creditors of *G.*

The Judge thereupon *held* that the transaction was void as an act of bankruptcy, and a fraudulent preference, and ordered *N.* to pay to the trustee the sum which he had received.

On appeal, *held*, that the purchase of the oil was a *bonâ fide* transaction in the ordinary course of trade, and that *N.* was a payee in good faith, and for valuable consideration; that there was no act of bankruptcy and no fraudulent preference.

The order of the County Court Judge was, therefore, discharged.

The proviso in s. 92 of the *Bankruptcy Act*, 1869, in favour of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration, extends to a case where the consideration is the payment of a pre-existing debt.

The Court may disregard the finding of a jury if it sees that it is inconsistent with the evidence, and need not direct a new trial to take place.

THIS was an appeal from a decision of the Judge of the County Court at *Huddersfield.*

James William Golden, an oil dealer at *Huddersfield*, filed a petition for liquidation by arrangement on the 7th of March, 1872. The first meeting of the creditors was held on the 23rd of March, but no resolution was come to, and *Golden* was on the 6th of April adjudicated a bankrupt on a petition filed on the 28th of March by a creditor named *Williamson*, the act of bankruptcy alleged being the filing of the petition for liquidation. Mr. *Tempest* was afterwards appointed trustee.

The bankrupt had formerly carried on business in partnership with a Mr. *Freeman*, under the firm of *Freeman & Golden.* This partnership was dissolved on the 8th of June, 1871, and *Golden* afterwards continued the business alone. Mr. *Joseph Norton* was *Golden's* brother-in-law, he and *Golden* having married ladies who were sisters. *Norton* had been in business, but in 1863 he had retired, and the business was continued by his sons, and a Mr. *Box*, under the firm of *Norton Brothers & Co.* *Norton* resided at a place

called *Nortonthorpe Hall*, near *Huddersfield*. On the 6th of June, 1871, *Golden* borrowed £400 from *Norton*, telling him that he wanted the money to pay for a cargo of oil which his firm had purchased. *Norton* understood that he was lending the money to the firm, but he drew a cheque for the sum in *Golden's* name alone. *Golden* gave a receipt for the money in his own name, in which it was stated that it was to be repaid in a month. The truth was (though of this *Norton* when he lent the money was ignorant) that *Golden* wanted the money to replace a sum which he had received on account of his firm and had misapplied. At the end of the month *Norton* applied to *Golden* for repayment of the £400. He said he could not repay it then, but promised to do so in a week or two. At the desire of *Norton*, *Golden* gave him another receipt for the money in the name of the firm, but he requested *Norton* not to apply to Mr. *Freeman* for payment, as, if he did so, *Golden* would lose some commission business which *Freeman* was in the habit of giving him. On the 11th of July *Norton* placed the matter in his solicitors' hands, and they pressed *Golden* for payment, and ultimately gave him till the end of July to pay. He did not pay within that time, and on the 1st of August he called upon *Norton* at *Nortonthorpe Hall*, and asked for further time. *Norton* replied that he must have a very speedy settlement, otherwise he should take proceedings. *Golden* said he would do what he could during the week. On the 5th of August *Golden* called upon *Norton* at his house, and said he had no money wherewith to pay his debt, but that he had some oil, and that if *Norton* could induce the firm of *Norton Brothers & Co.* to buy it, he (*Golden*) would pay *Norton* out of the proceeds. *Norton* then went to the mills of *Norton Brothers & Co.*, and saw Mr. *Box*, and told him that *Golden* wanted to sell some oil; that he owed *Norton* £400 and interest; and that if *Norton Brothers & Co.* would buy the oil, *Golden* had promised to pay *Norton's* debt out of the purchase-money. *Box* said that his firm did not require any oil, but, on being pressed by *Norton* to buy it as a favour to himself, *Box* consented to see *Golden*. *Golden* then went to see *Box*, and the result was that *Box*, on behalf of *Norton Brothers & Co.*, agreed to buy fourteen casks of oil from *Golden*. At this time *Golden* had no oil, but on the 9th of August, he contracted with Mr. *Williamson* to buy fourteen casks of oil for

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£478 11*s.* 8*d.* This oil was sent by *Golden's* directions to a railway station near the mills of *Norton Brothers & Co.*, and was by his order delivered to them. *Golden* never paid *Williamson* the price of it, and had not when he ordered it the means of doing so, or any expectation of being able to pay for it. The oil was invoiced by *Golden* to *Norton Brothers & Co.*, at £473 17*s.* 10*d.*, from which was deducted £11 16*s.* 10*d.* discount for cash payment. On the 15th of August *Golden* called by appointment at the warehouse of *Norton Brothers & Co.* in *Huddersfield*. *Norton* was there, and he produced an account for £404 19*s.* 6*d.*, viz., £400 loan, together with interest and banker's commission. *Golden* then authorized Mr. *Box* to retain out of the price of the oil the £404 19*s.* 6*d.*, and pay it to *Norton*, and the balance, £57 1*s.* 6*d.*, was then paid by *Box* to *Golden*. On the 27th of August, 1872, *Norton Brothers & Co.* paid *Norton* £399 16*s.* 6*d.*, viz., the £404 19*s.* 6*d.* less £5 3*s.* which he had agreed to allow them for a loss which had occurred by leakage of some of the oil.

When *Golden* became bankrupt he owed about £1000, besides the debt to *Williamson* for the oil, and his assets were of scarcely any value. At the time when the oil was sent to *Norton Brothers & Co.*, it constituted substantially the whole of *Golden's* property. After the bankruptcy the trustee took proceedings to set aside this transaction with *Norton* as being a fraudulent preference or an act of bankruptcy. The matter was tried by the County Court Judge with the assistance of a jury. *Golden* and *Norton* were examined and cross-examined at great length with the view of proving that they were both parties to a deliberate fraud on *Williamson*, in order to pay *Norton's* debt. The Judge put the following issues to the jury:—

1. Was the transfer, delivery, gift, or conveyance of certain oil made by the bankrupt with a view to satisfy and discharge a past debt due to *Joseph Norton* or not; and did such transaction constitute a transfer, delivery, gift, or conveyance of substantially the whole of the property of the bankrupt?

2. Was the bankrupt, at the time the transfer or payment was made, insolvent and unable to pay his debts?

3. Had *Joseph Norton* knowledge at the time that the oil was so delivered or transferred, or agreed so to be, that the

bankrupt had no other means to pay him but by obtaining goods on credit?

4. Was the delivery of the oil a gift, grant, bargain, or conveyance thereof made by the bankrupt to delay, hinder, or defraud the creditors of their just and lawful debts, and was it a fraudulent gift, delivery, or transfer or conveyance thereof by the bankrupt?

5. Was the transfer, delivery, gift, or conveyance made by the bankrupt in good faith, and upon good consideration, to a person not having at the time any manner of notice or knowledge of the fraud, or of any act of bankruptcy committed by the bankrupt, and available against him for adjudication?

6. Was the transfer of the oil or payment made to *Joseph Norton*, or to any person in trust for him, with a view of giving *Joseph Norton* a preference over the other creditors of the bankrupt, and was *Joseph Norton* a purchaser, payee, or incumbrancer in good faith and for valuable consideration?

7. Did the bankrupt make the payment in consequence of the importunity and pressure of Mr. *Norton?*

The jury answered the first four of these issues in the affirmative, the fifth in the negative, the first part of the sixth in the affirmative and the second part in the negative, and the seventh in the negative.

The following order was thereupon made by the Court:—

"The Court doth, upon the finding of such facts by the jury, adjudge and direct that the transfer, delivery, gift, or conveyance of the oil by the bankrupt was an act of bankruptcy, as a delivery of substantially the whole of the property of the debtor with a view of satisfying and discharging a pre-existing debt, and at a time when the bankrupt was insolvent and unable to pay his debts; that the said transaction is also an act of bankruptcy as a fraudulent delivery of the property of the bankrupt; and that the said transaction is also void as an unlawful gift, grant, bargain, or conveyance of the said oil by the bankrupt to the said *Joseph Norton*, to delay, hinder, or defraud the creditors of the bankrupt of their just and lawful debts, the said *Joseph Norton* having notice or knowledge of the fraud and of the act of bankruptcy committed by the bankrupt. The Court doth also adjudge and direct that the said transaction was a fraudulent preference

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by the bankrupt, made by him with a view of giving *Joseph Norton* a preference over the other creditors of the bankrupt, the said *Joseph Norton* not being a purchaser, payee, or incumbrancer, in good faith and for valuable consideration; and the Court doth, in pursuance of the said finding, order and direct that the said *Joseph Norton* do pay to *J. W. Tempest*, the trustee under the said bankruptcy, the sum of £404 19*s.* 6*d.*" It was also ordered that *Norton* should pay the costs of the trustee, and that the trustee should pay the costs of *Williamson*, and recover the amount thereof over from *Norton*.

From this order Mr. *Norton* appealed.

Mr. *Kay*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

It is clear, from the evidence, that the payment was made by *Golden* in consequence of continued pressure on the part of *Norton*, and that would be enough to prevent the transaction from being now undone as a fraudulent preference even under the law as it stood before the *Bankruptcy Act*, 1869: *Brown* v. *Kempton* (1); *Thompson* v. *Freeman* (2); *Ex parte Hibernian Banking Company* (3). The law as to this is not altered by the Act of 1869: *Ex parte Tempest* (4). Moreover, by sect. 92 the transaction is protected because it took place more than three months before the bankruptcy, and it is also (if necessary) protected by the proviso in that section in favour of a purchaser or payee in good faith and for valuable consideration. *Ex parte Bolland* (5) shews that if immaterial or misleading issues are put to the jury, the Court may disregard them. That was the case here. Then it is said that the delivery of the oil was an act of bankruptcy, as it was a transfer of substantially the whole of the bankrupt's property in consideration of a past debt. But it was a sale of the oil in the ordinary course of business, not to *Norton*, but to a firm in which he was not a partner, and the price was paid. It is true that *Norton* was paid his debt out of the price, but that payment was made in pursuance of a promise given in consequence of his pressure: *Philps* v. *Hornstedt* (6); *Lomax* v. *Buxton* (7). The

(1) 19 L. J. (C.P.) 169.
(2) 1 T. R. 155.
(3) 14 Ir. Ch. Rep. 113.
(4) Law Rep. 6 Ch. 70, 74.
(5) Ibid. 7 Ch. 24.
(6) Ibid. 8 Ex. 26.
(7) Law Rep. 6 C. P. 107.

order of the County Court Judge ought, therefore, to be discharged.

Mr. *De Gex*, Q.C., and Mr. *Tindal Atkinson*, for the trustee:—

This is in substance a motion for a new trial. In *Ex parte Bolland* (1), the Lords Justices said that the finding of a jury cannot be reversed as to matters of fact; and at law it is always very difficult to obtain an order for a new trial: *Mellin* v. *Taylor* (2); *Ashley* v. *Ashley* (3). The intent or motive with which a payment was made is pre-eminently a question for a jury: *Cook* v. *Rogers* (4); *Cook* v. *Pritchard* (5); *Bills* v. *Smith* (6); *Belcher* v. *Prittie* (7). Here the jury have found that the motive was to prefer *Norton*. Ineffectual pressure is immaterial. But at any rate there was clearly an act of bankruptcy committed. It is plain from the evidence that this oil was substantially the whole of *Golden's* property, and when he had contracted to sell it the debt due to him for its price became substituted for the oil. The whole of that price, with the trifling exception of the £57, was by his direction handed over to *Norton* to pay a past debt. This was clearly an act of bankruptcy. There is no difficulty, as under the old law, arising from the use of the words "goods and chattels" in the Act. In sect. 6, sub-sect. 2, of the Act of 1869, the words are "fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof." This will include a payment of money or a transfer of a debt. If a man's whole property consisted of bank-notes or sovereigns, and he paid substantially the whole to one creditor to pay a past debt, that would be an act of bankruptcy, and knowledge on the part of the creditor is immaterial: *Newton* v. *Chantler* (8); *Woodhouse* v. *Murray* (9); *Butcher* v. *Easto* (10); *Smith* v. *Timms* (11); *Siebert* v. *Spooner* (12); *Smith* v. *Cannan* (13); *Hall* v. *Wallace* (14); *Ex parte Hawker* (15); *In re Wood* (16); *Ex parte*

(1) Law Rep. 7 Ch. 24.
(2) 3 Bing. N. C. 109, 111.
(3) 2 Str. 1142.
(4) 7 Bing. 438.
(5) 5 Man. & G. 329.
(6) 6 B. & S. 314.
(7) 10 Bing. 408.
(8) 7 East, 138.
(9) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.
(10) 1 Doug. 295.
(11) 1 H. & C. 849.
(12) 1 M. & W. 714.
(13) 2 E. & B. 35.
(14) 7 M. & W. 353.
(15) Law Rep. 7 Ch. 214.
(16) Law Rep. 7 Ch. 302.

7 Jur. N.S. 1015
17 Jur. 911

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Fisher (1). Both *Philps* v. *Hornstedt* (2) and *Lomax* v. *Buxton* (3) are distinguishable from the present case. In the former the decision was that a creditor who, having goods of the bankrupt in his possession on which he had a lien, obtained from the bankrupt a right to sell, might set off against the price not only the amount of his lien, but also the amount of a dishonoured acceptance of the bankrupt, though the goods were in fact the whole property of the bankrupt; and in the latter there was an equivalent for the transfer. The conclusion is that in this case *Golden* committed an act of bankruptcy on the 15th of August by transferring substantially the whole of the sum due to him from *Norton Brothers & Co.* to *Norton*, and that is enough to dispose of this case. But if it be said that this was not substantially the whole of the bankrupt's property, still a transfer of a part of his property by way of fraudulent preference of one creditor may be bad as an act of bankruptcy under sect. 6, sub-sect. 2, of the Act, even if it be beyond the limit of three months mentioned in sect. 92. On these grounds the order of the County Court Judge ought to be affirmed.

Mr. *Kay*, in reply:—

Philps v. *Hornstedt* is exactly in point. It decided that a gift of the price of goods sold is not a transfer of property within sect. 6, sub-sect. 2, of the Act.

SIR JAMES BACON, C.J.:—

The most remarkable feature in this appeal is, the enormous length to which a reasonably simple case has been drawn out. I have not heard it suggested on either side that there was anything in the case which made it necessary to have recourse to a jury, for the only possible question was, whether an act of bankruptcy had been committed in the month of August, 1871. If there had been, whether it was on the 5th or the 15th, the trustee had a title by relation. If no such act of bankruptcy was committed, then the trustee could not claim under the doctrine of fraudulent preference, the transaction having been completed more

(1) Law Rep. 7 Ch. 636. (2) Law Rep. 8 Ex. 26.
(3) Law Rep. 6 C. P. 107.

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than three months before the commission of an act of bankruptcy. Although Mr. *De Gex* promised to shew me that, notwithstanding the 92nd section, there was some other law by which a fraudulent preference could be made an act of bankruptcy, I cannot say he has succeeded, nor can I find any other act of bankruptcy on which any judicial determination can be founded, except that which is defined by the 6th section of the present *Bankruptcy Act.* The authority for an adjudication is purely statutory. There is no power beyond what the statute gives; there is no law, nor rule of law, except that which is to be derived from the words of the statute. The words of the statute are as plain as anything can possibly be, and they are not used there for the first time. Among the acts of bankruptcy there enumerated, and the only one with which we have now to do, is this—"That the debtor has in *England* or elsewhere made a fraudulent conveyance, delivery, gift, or transfer of his property, or of any part thereof." It is upon these words that the question must be determined.

His Lordship then said that the case raised and presented to the jury was, that there had been a conspiracy between *Norton* and *Golden* to defraud *Williamson* in order to pay the debt due to *Norton,* and this case entirely failed in proof, inasmuch as it rested only on the evidence of *Golden,* whose testimony, upon his own shewing, was not to be relied upon, and was clearly and positively denied and disproved on the part of the Appellant. His Lordship continued:—Now what are the facts relating to the act of bankruptcy alleged? First, on the 5th of August, the bankrupt himself goes to Mr. *Norton,* to whom he was indebted in a sum of £400, and for the payment of which he had been repeatedly pressed by *Norton's* attorney; proceedings had been threatened, and the time which had been given him had expired. He represents to *Norton* that he has got some oil to sell, that if Mr. *Norton* can prevail upon his successors in business to buy that oil, that will furnish him (the bankrupt) with the means of paying the debt to Mr. *Norton.* Mr. *Norton,* who seems to have had a friendly disposition towards him, thereupon goes to Mr. *Box,* the acting partner of a firm of manufacturers of which *Norton* was not a member, and asks Mr. *Box* to buy the oil, for he says if you buy it I shall get paid my debt out of the purchase-money. Mr.

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Box, rather as a favour to Mr. *Norton* than anything else, for he did not then want the oil, agrees to deal with Mr. *Golden* for the purchase of the oil. Accordingly, on the same day, Mr. *Golden* goes down to Mr. *Box* and discusses the subject of the purchase of the oil, a sample of which is produced by the bankrupt. The terms are agreed upon; the quantity is settled; and then, in the most ordinary way of business, *Golden* draws out a contract note specifying the quantity of oil, the price at which it is to be sold, the time at which it is to be delivered, and that he hands to Mr. *Box*, and the transaction, so far, is completed. Now, is that an act of bankruptcy as defined by the statute? A tradesman selling his goods in the regular course of his trade for a price which is admitted to be a fair price, concluded as far as such transactions are concluded between tradesmen. From that time what were the rights of the parties? The bankrupt had a right, if the contract was not performed on *Box's* part, to sue him upon it, and Mr. *Box* had a right to compel the performance of the contract by the bankrupt. I conceive that cannot be held to be a fraudulent gift, delivery, or transfer of any of the goods of the bankrupt.

There has been a faint attempt to say that, although this contract which I have described was entered into between these parties, it was in fact a gift, delivery, or transfer to Mr. *Norton*. Nothing can be more directly opposed to the true facts of the case, nor to the rights of the respective parties. If *Golden* had become bankrupt the next day the debt which Mr. *Box* had contracted with him would have been part of his estate; if he had died it would have been administered as part of his estate; if he had failed to perform the contract he was liable to Mr. *Box*. Try it by any of the ordinary indications of property, and the right of the bankrupt seems to be that which any man dealing in an ordinary transaction of trade and purchase and sale would acquire, and it differed in no respect from the most ordinary transaction.

Then comes another day, the 15th of August. I have said that, in the course of the conversation between Mr. *Norton* and Mr. *Golden*, Mr. *Golden* had engaged Mr. *Norton* to procure the sale of the oil, because it would furnish him with the means of paying his debt, and had promised him that his debt should be paid out of the proceeds of that sale. The oil is delivered to *Box* in the

ordinary course of trade, and in accordance with the contract note, it is invoiced in common form, and the day for settling the account is fixed. The parties met at *Huddersfield* for the purpose. The way in which this oil had been procured by the bankrupt has since been investigated; and it is that which really gives rise to the present question, because, although I regret, as everybody must, that Mr. *Williamson* has been defrauded by the bankrupt of his property, it is impossible not to see that this is Mr. *Williamson's* proceeding. Mr. *Williamson* is the only creditor, with the exception of creditors for two very trifling sums, who has proved under this bankruptcy. The circumstances under which the bankrupt became possessed of the oil appear to be, that, after he had made the contract with *Box*, he wrote to Mr. *Williamson* in the ordinary way of trade, saying, "I may want some oil, have you any to sell," and Mr. *Williamson* answers, "Yes, I have some oil, and will sell it for so and so." The bargain between them is concluded, and the order for delivery given by Mr. *Williamson*, who says, "I sold it him, believing he was a man in good credit. I sold it him in order that he might deal with it in the way of his trade;" and so exactly he did, for he sold it for a fair price and, as I have mentioned, to *Box* for *Norton Brothers*.

On the 15th of August, which was the day appointed for the completion of the business, the bankrupt meets *Box* and *Norton* at *Huddersfield*. The account is drawn up, to which no objection is now taken; a perfectly just account for anything I know about it. Mr. *Norton* brings in his demand, consisting of the original loan and interest upon it. That, according to the agreement between them, is then disposed of by the bankrupt giving an order to his purchasers, Mr. *Box's* firm, to pay over the sum mentioned to Mr. *Norton* in discharge of his debt. Mr. *Norton* accepts those terms, and gives the bankrupt a receipt for the debt, and that transaction then and there ends. Now, whatever may be the effect of that, I think it cannot be held to be an act of bankruptcy. The words of the statute, which can neither be altered nor enlarged, preclude any such conclusion.

Then as to the question of fraudulent preference, the 92nd section provides: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation in-

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curred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

Now a great many of the cases which Mr. *De Gex* cited, as to some of them at considerable length, proceeded on a different state of the law. The Courts were formerly often embarrassed with questions about "contemplation of bankruptcy," and there was then no such protection as is afforded by the last words I have read. The first provision now is, that the condition of the debtor shall be such as that he cannot pay his debts with his own money. There is nothing about "contemplation of bankruptcy." But the other is of most vital importance, because no such preference, if it be a preference, is to have any effect if the person preferred is a purchaser, payee, or incumbrancer in good faith and for valuable consideration. Mr. *De Gex* suggested that, according to the true construction of the Act of Parliament, that means a present consideration. But I am not prepared to adopt that view of the statute. It would be very much opposed to my notions of the law as it stands, and to the ordinary transactions of life, to say that an overdue bill could not be paid, that a bill already due could not be paid, that any pre-existing debt could not be satisfied. Unless, therefore, it can be established, as in my opinion it cannot, that upon the transfer by Mr. *Box,* or Mr. *Box's* firm, of the debt due from the bankrupt *Golden* to *Norton* in pursuance of the arrangement with Mr. *Box,* having regard to what had taken place between *Norton* and *Golden,* an act of bankruptcy was committed, there is nothing upon which it can be said that any act of bankruptcy then existed. The statute has very carefully pointed out what shall be acts of bankruptcy. When it deals with preferential payments the enactment excludes the calling any such payment

an act of bankruptcy, for a totally different remedy is given for it. It is declared to be void, and as a consequence of that the payment may be recalled, and it being recalled the estate of the bankrupt is by so much the better.

Then, as I said in the course of the argument, if you can establish an act of bankruptcy earlier than three months before the time of the filing of the petition upon which the adjudication is founded, the question may be raised. There is not any attempt made to do that, unless this transaction itself can be called an act of bankruptcy. Now what part of this statute calls this an act of bankruptcy? It is no gift, delivery, or transfer. It is said that the debt is a chose in action, and that it has been transferred. The debt has been ordered to be paid in pursuance of a previous engagement, and the debt has in consequence been paid, as appears upon the evidence. The voluntary nature of the payment is the subject of a great deal of evidence. I have already said the evidence of the pressure is almost uncontradicted, and it consists of the statements of Mr. *Norton* himself and of Mr. *Owen*, his solicitor. Against that is set the statement of the bankrupt, who, as I said before, is not to be believed, unless his assertions are corroborated. The transactions of the 5th and the 15th of August are proved by Mr. *Box* and Mr. *Norton*, and their evidence is only met by such statements as the bankrupt himself makes. That there was no act of bankruptcy by the sale by this trader of his goods to *Norton Brothers*, at the price they had consented to pay, and had paid, seems to me perfectly clear. It is equally clear that the payment made to Mr. *Norton* was made in pursuance of his urgent demand, and not with intent to prefer him to any other creditor, because of that there is not the smallest particle of evidence on which the jury could have acted.

There, therefore, is the case, and why all this time and all this expense has been employed in dealing with a case so plain is what I cannot understand. Under the 72nd section any question of fact may be directed to be tried by a jury; but that does not relieve the Judge from deciding according to the law, or enable him to cast upon the jury the duty of pronouncing the law. By the examinations which had been taken in the presence of the Judge, and by the affidavits which had been filed, the Court was in pos-

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session of all the evidence in the case, and the subsequent examinations before the jury did not in any material degree add to or alter that evidence. It appears to me, therefore, that there was no sufficient reason for directing a further inquiry. But if there had been, the issues which were directed were such as in my opinion ought not to have been directed. I do not think they were calculated to elicit the true facts of the case, in order that the law might be applied to those facts. The jury found that "the transfer, delivery, gift, or conveyance of certain oil was made by the bankrupt with a view to satisfy and discharge a past debt due to *Joseph Norton*, and that such transaction did constitute a transfer, delivery, gift, or conveyance of substantially the whole of the property of the bankrupt." That finding is directly against the evidence. There was no such transfer, delivery, gift, or conveyance made by the bankrupt to satisfy the debt due to *Norton*. The jury also found that "the bankrupt was at the time unable to pay his debts." That seems to be consistent with the facts. Then they find "that *Joseph Norton* had knowledge at the time the oil was so delivered or transferred, or agreed so to be, that the bankrupt had no other means to pay him but by obtaining goods on credit," of which there is no particle of evidence. "That the delivery of the oil was a gift, grant, bargain, or conveyance thereof made by the bankrupt to delay, hinder, or defraud the creditors of their just and lawful debts, and that it was a fraudulent gift, delivery, transfer, or conveyance thereof by the bankrupt." The delivery of the oil I have already described. It was a bargain and sale, and the purchase-money was due in respect of the transaction, and this finding has no application to any part of the case. Then it is stated, "We find that the transfer was not made by the bankrupt in good faith and upon good consideration to a person not having at the time any manner of notice or knowledge of the fraud or of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." That also is as directly against the facts proved as anything can be. It is impossible for any judicial tribunal to act upon such a finding by the jury when it is at variance with the fact. "The transfer was not made in good faith and upon good consideration to a person not having at the time any manner of notice or knowledge of the fraud or of any act of bankruptcy committed by the bankrupt

and available against him for adjudication." First of all it is not pretended that any act of bankruptcy had at that time been committed; nor is there any attempt to shew that Mr. *Box* when the transfer was made had any notice of any other transaction except the conversation which had taken place between himself and Mr. *Norton* and between himself and the bankrupt, and the goods were in fact sold and delivered and the price was in fact paid. They find further "That the transfer of the oil or payment was made to *Joseph Norton* or to some person in trust for him," which is wholly unfounded, "with a view of giving *Joseph Norton* a preference over the other creditors of the bankrupt, and that *Joseph Norton* was not a purchaser, payee, or incumbrancer in good faith and for valuable consideration, and that the bankrupt did not make the payment in consequence of importunity or promise of Mr. *Norton*." I pass over both those last findings, because, unless the act of bankruptcy is established, the 92nd section is a complete protection for all that was then done. The 92nd section is not perhaps the only one which might be referred to upon this occasion; there is the 94th section:—[His Lordship read the 94th section.]

There is no pretence for saying that any such act of bankruptcy as is there mentioned had been committed by the bankrupt, or that anybody had had notice of it.

In my opinion, then, the issues were not such as ought to have been directed, and the finding of the jury upon them being such as I have described, the question comes before the Court whether the finding is to be adopted. It has been urged before me that the jury are judges of this matter. The jury are judges of fact, but of fact only. In the Court of Chancery we used to be more familiar than we are at present with sending questions of fact to be dealt with by a jury, but I never heard that the Court was bound by the finding of the jury. If it was necessary to have a new trial, that was directed; if it was not necessary—if it was seen that the finding of the jury was one which the Court could not with propriety, and with regard to the undisputed facts of the case, act upon—the Court did not hesitate to disregard the finding of the jury. In that position, I conceive, was the learned Judge who had this finding of the jury before him, who, guided by the Act of Parliament, had the means of forming his own opinion on the

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subject, and who had already suggested to the jury that Mr. *Golden's* evidence, to have any weight, required corroboration. Corroboration there is none; contradiction there is much. Belief cannot safely or properly be placed in anything that Mr. *Golden* said.

But the learned Judge's order is this, without any observation whether he was or was not satisfied: "The Court doth, upon the finding of such facts by the jury, adjudge and direct that the transfer, delivery, gift, or conveyance of the oil by the bankrupt was an act of bankruptcy, as a delivery of substantially the whole of the property of the debtor with a view of satisfying and discharging a pre-existing debt, and at a time when the bankrupt was insolvent and unable to pay his debts." Now, in that finding there are mixed up several different things. There is a scrap from the 92nd section, and there is some allusion to the 6th section; but there was here no transfer, delivery, gift, or conveyance of the oil by the bankrupt which can be said to be an act of bankruptcy, for he sold and transferred it to Messrs. *Norton Brothers,* and contracted for and received payment of the price for which he engaged to sell and deliver it. That transaction, the learned Judge thinks, is also an act of bankruptcy, "as a fraudulent delivery of the property of the bankrupt, and that the said transaction is also void as an unlawful gift."

It is, in my opinion, upon undisputed facts, clear, first of all, that there was pressure—whatever effect that may have—real, earnest, continuous pressure; and next, that such payment as was in fact made (I am speaking now of the transfer of the debt) to Mr. *Norton* was made in perfectly good faith on his part, his good faith being in no way impeached by the statement of the bankrupt, and that it was no gift, grant, bargain, or conveyance to delay, hinder, or defraud the creditors, Mr. *Norton* having no notice or knowledge of any act of bankruptcy committed by the bankrupt, there being no fraud that I can perceive, and certainly no act of bankruptcy committed by the bankrupt.

Then the order goes on: "The Court doth also adjudge and direct that the transaction was a fraudulent preference by the bankrupt, made by him with a view of giving *Joseph Norton* a preference over the other creditors of the bankrupt, *Norton* not being a purchaser, payee" (as certainly he was), "or incumbrancer in good faith and for valuable consideration."

With the greatest possible respect and deference for the learned Judge, and with a strong impression that he bestowed a great deal of pains and care upon the investigation which took place before him, I am wholly unable to see any reason why any question was submitted to the jury. But assuming that to have been right, I am wholly unable to concur in the judgment which was pronounced, upon the finding of the jury and upon the facts, by the learned Judge.

Having listened to very long and learned arguments by counsel, and having read and considered the voluminous evidence, I feel myself compelled to the conclusion that no act of bankruptcy is proved to have been committed either on the 5th or the 15th of August; that the payment on the 15th of August, if the object was to give to Mr. *Norton* a preference over the other creditors, was made in consequence of urgent, sincere, honest, resolute pressure on Mr. *Norton's* part, and that it was received by Mr. *Norton* in perfectly good faith, for perfectly valuable consideration, without notice or knowledge of any act of bankruptcy at that time committed; and that in no case can it be impeached by the trustee under his title by relation.

I am of opinion, therefore, that the order which the learned Judge has made directing Mr. *Norton* to pay to the trustee the sum which is mentioned in the order is one that cannot be sustained, and that it must be discharged, and the amount so paid must be returned; and, as a consequence, that the order for the payment of the costs must also be discharged. The order for payment of costs contains also a direction to the trustee to pay Mr. *Williamson's* costs and have them over against Mr. *Norton*. So much of it as directs the trustee to have recourse to Mr. *Norton* for anything he pays to Mr. *Williamson*, I think, must be discharged. Mr. *Norton* will have his costs in the Court below, but there will be no costs of the appeal (1).

Solicitors for Mr. *Norton*: Messrs. *Edwards, Layton, & Jaques*, agents for Messrs. *Hesp, Fenton, & Owen, Huddersfield*.

Solicitors for the Trustee: Messrs. *Learoyd & Learoyd*.

(1) An appeal from the order was set down for hearing before the Lords Justices, but before it was argued the parties came to a compromise, and Mr. *Norton* consented to an order for payment to the trustee of the sum claimed.

C. J. B.

1873

June 30.

Ex parte CONNING. *In re* STEELE.

Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Registration—Equitable Assignment—Letter of Hypothecation—Agreement to execute Bill of Sale.*

5 C P D 269.

Traders, in consideration of goods being supplied to them by brokers on credit, signed a written document addressed to the brokers, by which they undertook and agreed "to hold at your disposal all our stock of soap and raw materials, and from time to time, whenever required by you so to do, to execute a valid and effectual transfer and assurance of the same to you . . . to the intent that out of the premises all claims and demands for the time being owing from us to you may be fully paid and satisfied." The security was to be a continuing one. This document was never registered under the *Bills of Sale Act*, nor was any bill of sale ever executed. Some time afterwards the traders filed a liquidation petition. A few days before the petition was filed the brokers demanded possession of the soap and raw materials then on the traders' premises, but did not succeed in obtaining it:—

Held, that the document, not having been registered under the *Bills of Sale Act*, was void against the trustee under the liquidation.

Ex parte Mackay (1) followed.

THIS was an appeal from a decision of the Judge of the County Court at *Liverpool*.

Thomas Murray Steele and *David Charles Keeling* were partners in the business of soap-makers. In May, 1870, they applied to Messrs. *Conning & Bridson* for a supply of tallow, resin, and other articles, which they agreed to supply on the payment of the price being secured to them by the following agreement, which was signed by *Steele & Keeling* on the 26th of July, 1870.

"To Messrs. *Conning & Bridson*, of *Liverpool*, Brokers.

"We, the undersigned, *D. C. Keeling* and *T. M. Steele*, of *Liverpool*, soap-makers, in consideration of your supplying us on credit with tallow, resin, and other articles, required by us in our said business, do hereby undertake and agree to hold at your disposal all our stock of soap and raw materials, and from time to time, whenever required by you so to do, to execute a valid and effectual transfer and assurance of the same to you at our cost; and for the consideration aforesaid we further undertake that all moneys coming to us from our agent, *William Ayres*, of *Leeds*, shall, if

(1) Law Rep. 8 Ch. 643.

required, be paid over or made payable to you to the intent that out of the premises all claims and demands for the time being owing from us to you may be fully paid and satisfied. This security to be a continuing one, and we undertaking at any time to execute to you all documents or assurances whatsoever which you may consider requisite in order to give effect to the security to be hereby created."

This agreement was never registered under the *Bills of Sale Act*.

On the 14th of Febuary, 1873, there was due from *Steele & Keeling* to *Conning & Bridson* for goods supplied the sum of £2500. On that day *Conning & Bridson* demanded possession of the soap and raw materials on the premises of *Steele & Keeling*, but it was refused, and the following day they asked for a bill of sale of the property, but without success. A bill in Chancery was on the 15th of February filed for specific performance of the agreement to give a bill of sale, and notice of motion for a receiver was given, but on the 19th of February, before the motion could be heard, *Steele & Keeling* filed a liquidation petition. The creditors resolved on a liquidation, and *A. W. Chalmers* was appointed a trustee. On the 3rd of April an order was made restraining further proceedings in the suit. On the 26th of April the Judge of the County Court made an order declaring that the agreement of the 26th of July, 1870, was a bill of sale, and void as against the creditors of *Steele & Keeling* for want of registration. *Conning & Bridson* appealed.

Mr. *Gainsford Bruce*, and Mr. *Rigby*, for the Appellants :—

This document is not within the *Bills of Sale Act* and does not require registration: 17 & 18 Vict. c. 36, s. 7. The document is a letter of hypothecation in the ordinary course of business, and operates only as an equitable assignment. It is not within the Act: *Brown* v. *Bateman* (1); *Ex parte North Western Bank* (2); *Holroyd* v. *Marshall* (3); *Langton* v. *Waring* (4). Moreover, we did all we could to get a formal bill of sale executed, but we did not succeed, and we did our best to obtain possession of the goods.

(1) Law Rep. 2 C. P. 272.
(2) Ibid. 15 Eq. 69.
(3) 10 H. L. C. 191. 9 Jur. N.S. 213.
(4) 18 C. B. (N.S.) 815.

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Ex parte CONNING. *In re* STEELE.

Mr. *Crompton*, for the trustee:—

The case is concluded by the decision of the Lords Justices in *Ex parte Mackay* (1), that an agreement to give a bill of sale is within the Act, and ought to be registered. If the document amounts to anything more than a mere promise it ought to be registered.

SIR JAMES BACON, C.J.:—

The argument of the Appellants, that this document amounted to an equitable assignment of the goods, seems to me to conclude the case entirely against them. If it was an equitable assignment it as much required registration as the most formal bill of sale. If, therefore, I were to adopt this view, I must decide against the Appellants. If this experiment were successful the *Bills of Sale Act* would be useless. The judgment of Lord Justice *James* in *Ex parte Mackay* appears to me to cover the case entirely. I rest my decision on the general policy of the law and the positive enactment, and I think it is clear that the Appellants can have no valid title to the goods as against the trustee under the liquidation in the absence of registration of the agreement. The decision in *Brown* v. *Bateman* (2) rests upon the peculiar circumstances of that case, and it has no application to the present case. The case of *Ex parte North Western Bank* (3) was as distinctly different from the present as any case could possibly be. There the transaction was an ordinary mercantile one. Can any one say that the transaction now before me was such? In my opinion the judgment of the County Court was the only decision which could be given, and the appeal must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Neal & Philpot*, agents for Messrs. *W. & A. Clare, Liverpool.*

Solicitor for the Trustee: Mr. *W. W. Wynne*, agent for Messrs. *H. Forshaw & Hawkins, Liverpool.*

(1) Law Rep. 8 Ch. 643. (2) Law Rep. 2 C. P. 272.
(3) Law Rep. 15 Eq. 69.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.
Ex parte CAMPBELL.
Ex parte HIPPISLEY.
Ex parte CROOM.

V.-C. W.
1873
April 18, 19, 21; *June* 2.

Winding-up—Void Amalgamation—Conduct of Shareholders—Repayment of Moneys to Allottees — Interest—Costs—Estoppel—Acquiescence — Dealings with Shares.

By an agreement dated in August, 1864, the banks of *H.* and *I.* were amalgamated. In September, 1864, a circular was issued by Bank *H.* to each shareholder in Bank *I.*, stating, in effect, that he was entitled to an allotment of a like number of new shares in Bank *H.* on the terms set forth. Bank *I.* was wound up voluntarily. The arrangement between the two banks was made subject to a provision that if any shareholder of Bank *I.* should express his dissent in writing within a period mentioned, he could be paid off.

W. C., who was an allottee of five shares in Bank *I.*, obtained, on his application in writing, an allotment of five shares in exchange of Bank *H.*, and he paid the deposit and premium and directors' calls. Bank *H.* was wound up, at first voluntarily, but afterwards under supervision, and *W. C.* was placed on the list of contributories. In May, 1868, on a bill filed in May, 1866, the amalgamation was set aside. In January, 1871, *W. C.* paid, but under protest, moneys demanded under a balance order. On summons by *W. C.*, in February, 1871, taken out after the decision in *Bank of Hindustan, China, and Japan* v. *Alison* (1):—

Held, that he was entitled to be repaid, with interest, all the moneys which he had paid upon his five shares, with costs.

H., who was an allottee of five shares in Bank *I.*, obtained, on his application in writing, an allotment of five shares in exchange of Bank *H.*, and he paid the deposit and premium and calls demanded of him by the directors and by the liquidators without any protest. He purchased, at a discount, other shares of Bank *H.* in the market, and had paid moneys on them. On a summons by him in July, 1872:—

Held, that he was entitled to be repaid, with interest, all the moneys which he had paid on the whole of his shares, but without costs, by reason of his summons having asked too much.

A. F. C. was an allottee of twenty shares in Bank *I.*, and had paid moneys on them to the directors, and he was the purchaser of thirty other shares in the market. He obtained, on his application in writing, an allotment of fifty shares in exchange of Bank *H.*, and he paid the deposit and premium

(1) Law Rep. 6 C. P. 222.

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and calls demanded of him by the directors. He attended meetings of the company. In 1866 he sold and transferred his fifty shares, and subsequently re-purchased them, and had them re-transferred to him. A summons by him in July, 1872, asking to have his name removed from the list of contributories and to be repaid certain moneys, was dismissed with costs.

Rest 16 Q.B. 1 C.P. 7.

THE *Bank of Hindustan, China, and Japan, Limited*, registered in July, 1862, and *Imperial Bank of China, India, and Japan, Limited*, registered in April, 1864, were amalgamated under an agreement dated the 24th of August, 1864, and approved by resolutions passed on the following day by meetings of both companies; but on a bill filed in May, 1866, the amalgamation was in May, 1868, set aside: *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (1).

Among the terms of the agreement for the amalgamation were, that new shares should be issued by the *Hindustan Bank* in exchange for *Imperial Bank* shares on certain terms as to deposit and premium, and that a dividend of £10 per cent. per annum from the time the *Imperial Bank* had been in operation should be paid to the shareholders of that bank on exchanging their certificates.

In pursuance of this agreement a circular was issued by the *Hindustan Bank* on the 15th of September, 1864, to each of the shareholders of the *Imperial Bank* to the effect that he was entitled to an allotment of a like number of shares in the *Hindustan Bank* at £6 per share premium; that the directors of the *Imperial Bank* had paid to the *Hindustan Bank* on account of the deposit the sum of £5 per share. A form was sent with the circular, requiring each shareholder in the *Imperial Bank* who claimed the option given to him of becoming a shareholder in the *Hindustan Bank* to pay, on application for an allotment of shares in the *Hindustan Bank*, £5 per share on account of deposit, and to agree to pay £5 per share, the balance of the deposit, and £1 per share on account of premium on the 12th of October, 1864, and to pay the remaining £5 per share on account of premium on the 12th of January, 1865. The *Imperial Bank* was wound up voluntarily. There was a provision in the terms of arrangement that if any member of the *Imperial Bank* should express his dissent from the resolu-

(1) Law Rep. 6 Eq. 91.

tions by a notice in writing to the liquidators within the period mentioned therein, and require them to purchase his interest, they were to pay him off. The following cases came before the Court upon three separate adjourned summonses:—

CAMPBELL'S CASE.

WILLIAM CAMPBELL was an allottee of five shares in the *Imperial Bank*, upon which he had paid £5 per share. He received the circulars which were addressed to the shareholders in reference to the amalgamation, but had no knowledge of the matters referred to therein. He attended no meeting of the shareholders either personally or by proxy of either bank. *Campbell* applied to the *Hindustan Bank* for five shares in exchange for his five *Imperial Bank* shares, and they were on the 21st of September, 1864, allotted to him. He agreed to and did pay the £6 per share premium and the deposit, and he subsequently, but before the winding-up, paid several calls, shortly after they were made. On the 23rd of January, 1865, he received certificates for five shares in the *Hindustan Bank*. The *Hindustan Bank* stopped payment in November, 1866, and was subsequently wound up, at first voluntarily, but afterwards under the supervision of the Court, by an order made on the 21st of December, 1866. *Campbell* was placed on the list of contributories.

In January, 1871, he was served with a balance order for £50 and £2 8*s.* 8*d.*, and those sums were paid under protest. After the decision by the Court of Exchequer Chamber in the case of *Bank of Hindustan, China, and Japan* v. *Alison* (1), *Campbell's* solicitors applied to the liquidators of the *Hindustan Bank* for a return of all sums which had been paid by him since the amalgamation, and as they refused to comply with that application a summons was, on the 24th of February, 1871, taken out on his behalf, asking that the list of contributories might be amended by striking out his name, and that he should be repaid all the sums which he had paid to the bank, with interest at £5 per cent.

(1) Law Rep. 6 C. P. 222.

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HIPPISLEY'S CASE.

HIPPISLEY was, at the time of the amalgamation, an allottee of five shares in the *Imperial Bank*, on which he had paid £25. He received the circulars in reference to the amalgamation, but did not attend either personally or by proxy any meeting of the shareholders of either bank. He applied for and was allotted five shares in the *Hindustan Bank*, and he had paid the premium and deposit moneys, and the calls made upon the shares, on the faith that there had been a valid amalgamation.

On the 13th of October, 1864, *Hippisley* purchased twenty shares in the *Imperial Bank* at $3\frac{1}{3}$ discount, and on the day following he purchased twenty more at the same rate, but the transfers were of forty shares in the *Hindustan Bank*, and he paid the calls which had been made upon them. *Hippisley* said he believed that the forty shares were *Imperial Bank* shares which had been exchanged for shares in the *Hindustan Bank*. He had been placed on the list of contributories. He had paid altogether, partly before and partly after the winding-up, the sums of £220 7*s.* 6*d.* and £1637 8*s.* upon the five shares and forty shares respectively. A summons was, on the 25th of July, 1872, taken out on his behalf, asking to have the list of contributories rectified by striking out his name, and claiming to have the sums which he had paid returned to him with interest thereon, and also a sum of £125, being the discount at which he had purchased the forty shares.

CROOM'S CASE.

ALEXANDER F. CROOM was at the time of the amalgamation an allottee of twenty shares in the *Imperial Bank*, on which he had paid £100. In June, 1864, he purchased thirty other shares in the same bank, and paid £176. He applied for and was allotted by the *Hindustan Bank* fifty shares in exchange, and he subsequently paid on them the premium and deposit money, and calls

made upon them. *A. F. Croom* attended two general meetings of the shareholders in the *Hindustan Bank* prior to its going into liquidation. He attended a meeting of the committee of shareholders prior to the winding-up, but subsequent to the presentation of the Petition; and he subsequently attended a meeting of the shareholders at which the liquidators were appointed. He was settled on the list of contributories. The evidence shewed that *A. F. Croom*, on the 27th of July, 1866, transferred his shares to *E. F. Croom*, and received for them £187 10*s.*, and that on the 25th of September, 1866, the same shares were re-transferred to *A. F. Croom* by *E. F. Croom* for the sum of £125.

On the 30th of July, 1872, a summons was taken out on the part of *A. F. Croom*, asking that the list of contributories might be rectified by striking out his name, and claiming to be repaid the sums which he had paid, with interest at £5 per cent. There was evidence shewing that the shares had been dealt with on the *Stock Exchange*. The three summonses came on to be heard together.

Mr. *Eddis*, Q.C., and Mr. *Jackson*, Q.C., for *Campbell*, after stating the facts, referring to *Alison's Case* (1), and pointing out that the only difference between *Campbell's* position and *Alison's* was that *Campbell* paid the calls made by the *Hindustan Bank* upon his shares, while *Alison* did not pay any calls, submitted that, unless it could be shewn that the cases were otherwise distinguishable, the decisions in *Alison's Case* must govern this, and that therefore *Campbell* was entitled to all that he asked for by his summons.

Mr. *Dickinson*, Q.C., and Mr. *W. Barber*, for *Croom*, submitted that this case was not distinguishable from *Alison's*. The decision of the Court of Exchequer Chamber in that case was in effect that these shares never were lawfully brought into existence, and that consequently the Defendant (*Alison*) did not become a shareholder in the Plaintiffs' (*Hindustan*) bank. The shares were not issued in pursuance of any power (2). There would probably be an attempt to shew that the dealing with these new shares upon the *Stock Exchange* had been in a manner which could not be

(1) Law Rep. 6 C. P. 222; Ibid. 15 Eq. 394. (2) Law Rep. 6 C. P. 227.

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distinguished from the dealing with the older shares, and it would be suggested that to grant what was now asked for would prejudice the interests of other shareholders; but such an argument would be no answer to *Croom's* application: *Western Bank of Scotland* v. *Addie* (1). *Sewell's Case* (2) would probably be referred to in support of the argument on the part of the liquidators; but it must not be forgotten that in that case *Sewell* had derived a benefit from the company, and the case was, therefore, distinguishable from this. The transfer and re-transfer of the shares in July and September, 1866, was at a time when it was supposed the shares were valid; but as it was subsequently decided that they were not, those dealings could not make any difference. The case being governed by the decision in *Alison's Case, Croom* was entitled to have back all his moneys.

Mr. *Rowcliffe*, for *Hippisley*, submitted that the fact of his being an allottee of five shares in the *Imperial Bank* and a purchaser of forty others, all of which he exchanged for new *Hindustan Bank* shares, made no practical difference between his position and that of *Campbell;* and that he was, therefore, entitled to have returned the moneys which he had paid.

Mr. *Greene*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Graham Hastings*, for the liquidators:—

These cases are different from that of *Alison*, for he did not receive certificates, nor was any balance order served on him, nor did he attend any meetings of the company. The principle, therefore, of the decision in that case (3), having regard especially to the £6 premium, does not govern these. These summonses claim repayment of money paid; but where there has been an order to pay moneys, and payment has been made in pursuance of the order, the money cannot be recalled: *Brisbane* v. *Dacres* (4); *Hamlet* v. *Richardson* (5); *Higgs* v. *Scott* (6); *Taylor* v. *Hare* (7). The process under an order in a winding-up under supervision is the

(1) 1 H. L., Sc. 163 164.
(2) Law Rep. 3 Ch. 131.
(3) Ibid. 15 Eq. 394.
(4) 5 Taunt. 143.
(5) 9 Bing. 644.
(6) 7 C. B. 63.
(7) 1 B. & P. (N. R.) 260.

same as under a writ: *Companies Act*, 1862, ss. 151 and 106. If there were any error of fact the money could be recalled, but not so if the error is one of law. Here some of the payments were made voluntarily, and under no misapprehension of law or fact on the part of the payers, and consequently they were bound by their acts—the purchase and sale of the shares, and attendance at meetings: *Bilbie* v. *Lumley* (1); *Chatfield* v. *Paxton* (2). If there had been fraud or misrepresentation on the part of the directors there might be ground for relief: *Lawes* v. *Purser* (3). These applicants, knowing at the time of the amalgamation that they could have their names removed from the register, elected to become shareholders in the *Hindustan Bank*: *Milnes* v. *Duncan* (4); *Los's Case* (5); and now they apply to have their contracts rescinded, and for restitution *in integrum;* but that cannot be granted; for all parties cannot be restored to the position they were in in 1864: *Clarke* v. *Dickson* (6); *Mixer's Case* (7); *Western Bank of Scotland* v. *Addie* (8). The case of each of these applicants is distinguishable from the others, and from those in *Higgs' Case* (9); *Martin's Case* (10), where the shares were irregularly issued; *Lamert* v. *Heath* (11) and *Brown* v. *M'Kinally* (12); but all are bound by their acts. They kept their shares till the winding-up, they received or might have received dividends, and they took upon themselves all the liabilities of partners to creditors. Their payments in the winding-up to the liquidators were by force of law and they confirmed and ratified previous payments. In *Alison's Case*, in the Common Pleas, the question turned upon estoppel, and these applicants are estopped from saying that everything done has not been properly done: *Hull Flax and Cotton Mill Company* v. *Wellesley* (13); *Bramston* v. *Robins* (14); *Currie* v. *Goold* (15). The decisions in *Clifton* v. *Cockburn* (16), *Kitchin* v.

(1) 2 East, 469.
(2) Ibid. 471, n.
(3) 6 E. & B. 930.
(4) 6 B. & C. 671.
(5) Sm. L. C. 6th Ed. 375; 13 W. R. 883.
(6) E. B. & E. 148.
(7) 4 De G. & J. 575–587.
(8) 1 H. L., Sc. 163.
(9) 2 H. & M. 657.
(10) Ibid. 669.
(11) 15 M. & W. 486.
(12) 1 Esp. 279.
(13) 6 H. & N. 38.
(14) 4 Bing. 11.
(15) 2 Madd. 163.
(16) 3 My. & K. 76.

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Hawkins (1), *Great Western Railway Company* v. *Cripps* (2), and *Stafford* v. *Stafford* (3), also apply; and those in *Stone* v. *Godfrey* (4), *Blackburn* v. *Smith* (5), *Hunt* v. *Silk* (6), and *Skyring* v. *Greenwood* (7), are very much in point.

These applicants do not shew how they have been damnified by the assumed invalidity. When they took the shares they were at a premium, and they remained so for some time afterwards. Hoping that the premium might be higher, they held the shares, and they did not say that if it had risen they would have repudiated them. We submit that for the reasons stated these cases are not touched by *Alison's Case;* that these applicants made voluntary payments to the directors with full knowledge of all the facts; that they knew what the documents were, and of all the arrangements between the two banks; that they accepted the dividend upon the exchange of certificates; and that therefore the summonses ought to be dismissed. It should also be mentioned that the Court has sanctioned terms of arrangement with many shareholders who entered into the arrangements upon the notion that they were liable, and it would be hard upon them, and an injustice, to take and retain their moneys, and to grant to these applicants the relief which they seek; further, the claim for interest is in the nature of damages, and how that can be asked for it is impossible to conceive.

The *Solicitor-General* (Sir *George Jessel*), Mr. *Benjamin*, Q.C., and Mr. *Marten*, for the executors of a very large shareholder, deceased, who had had leave to attend the proceedings:—

There must be some principle in these cases. The so-called amalgamation between these two companies was not the first that had broken down through some defect in the arrangements. The principle relied upon on behalf of the executors is that laid down in *Dougan's Case* (8). That decision is perfectly intelligible, and in all these cases the only question which the Court has to consider is, have the acts of the parties placed them in such a position

(1) Law Rep. 2 C. P. 22. 12 Jur. N.S. 928
(2) 5 Hare, 91.
(3) 1 De G. & J. 193.
(4) 5 D. M. & G. 76. 18 Jur. 524
(5) 2 Ex. 783.
(6) 5 East, 449.
(7) 4 B. & C. 281.
(8) Law Rep. 8 Ch. 540.

that they are estopped from saying that everything that has been done has not been properly done? In the cases of the *Hull Flax and Cotton Mill Company* v. *Wellesley* (1), and *In the Matter of the Bahia and San Francisco Railway Company, Limited, and Amelia Trittin and Others* (2), the doctrine of estoppel was acted upon, and those decisions are binding on this Court. The only question decided in *Alison's Case* in the Common Pleas (3) was that he had not done such acts as bound him. The Judges did not deny the applicability of the doctrine of estoppel; but it was clear that the decisions in *Alison's Case* did not apply to these cases; certainly not to the case of *Croom*, who, in addition to attending meetings, sold his shares, received the purchase-money, and then re-purchased the shares, and therefore his acts bound him. *Hippisley* might be said to be in as bad a position, for he bought all but five of his shares in the market, and as he got those shares by transfer it could not be successfully argued that *Alison's Case* governs his in respect of them; but *Hippisley*, even in respect of the five shares which he received from the company, and *Campbell* in respect of his shares, are not entitled to any relief, for they have by their acts and their dilatory conduct, after public judicial notice that the amalgamation was *ultrà vires*, elected to remain members of the company. The principle is clearly stated in *Higgs' Case* (4); *Martin's Case* (5). Both *Hippisley* and *Campbell* have so acted that they are affected with acquiescence. *Alison* did not act as they have done. They are too late in making these applications to have their names taken off the list of contributories, for the winding-up having been nearly completed, all parties could not be placed in their proper positions: *In re Saxon Life Assurance Society, Anchor Case* (6), and *Ex parte Era Assurance Company* (7), affirmed on appeal. But it seemed to be thought that Vice-Chancellor *Giffard* simply set aside the amalgamation. What he said, however, in reference to the question of acquiescence was very important: *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (8). There was

(1) 6 H. & N. 38.
(2) Law Rep. 3 Q. B. 584.
(3) Ibid. 6 C. P. 227.
(4) 2 H. & M. 657.
(5) 2 H. & M. 669.
(6) 2 J. & H. 408.
(7) 11 W. R. 59.
(8) Law Rep. 6 Eq. 100–101.

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no acquiescence on the part of the *Hindustan Bank*, for there were forty-one dissentient shareholders. Every shareholder had a right to act as he pleased, and the question is, who assented to become shareholders in the amalgamated company; and these applicants certainly assented. In *Alison's Case* it was, after a full examination of the facts, held that he did not become a shareholder, for he only applied for shares, and did nothing more. The position of these applicants is very different; they held their shares, acquiesced in what was done by the directors and liquidators, and consequently they are bound by acquiescence. It is not necessary to shew direct assent; acquiescence results from general knowledge of what is going on, and from refraining from opposition: *Spackman* v. *Evans* (1); *Evans* v. *Smallcombe* (2); *Houldsworth* v. *Evans* (3). These applicants had quite sufficient notice: *Los's Case* (4). Whether the amalgamation was valid or not it depended upon the will of each whether he would remain a shareholder or not: *Higgs and Martin's Cases* (5); and the acts done shew that all agreed to remain, and they cannot now ask that their co-adventurers should suffer all the loss which has resulted from the shipwreck, and to be repaid their moneys: *Hart* v. *Frontino and Bolivia South America Gold Mining Company, Limited* (6). But these moneys could not be recovered back, even though some sums were paid under protest: *Marriott* v. *Hampton* (7). Certainly those of these applicants who bought shares in the market cannot now recover from the company the moneys which they had paid upon them: *Challis's Case* (8); *Oakes* v. *Turquand* (9); *Ex parte Bastow* (10). These applicants ought not to be allowed, after all their acts and conduct, to re-open everything which has been done, and therefore their summonses ought to be dismissed, and such a conclusion would be perfectly consistent with the decision in *Alison's Case*.

Mr. *Jackson*, in reply:—

These cases were ordered to stand over until *Alison's Case* had

(1) Law Rep. 3 H. L. 171.
(2) Ibid. 249.
(3) Ibid. 263.
(4) Sm. L. C. 6th Ed. p. 375; 13 W. R. 883.
(5) 2 H. & M. 657, 669.
(6) Law Rep. 5 Ex. 111.
(7) 7 T. R. 269; Sm. L. C. 6th Ed. 377.
(8) Law Rep. 6 Ch. 266.
(9) Ibid. 2 H. L. 325.
(10) 37 L. J. (Ch.) 51.

been determined by the Court: hence the delay complained of. They are similar to *Alison's Case*, and therefore that decision governs them. Was *Alison* a contributory? He certainly made default in payment, and the directors forfeited his shares, but they could not have done that except on the footing of his being a partner. He was liable quite as much as a transfering shareholder: *Creyke's Case* (1). There was no proof that *Alison* disclaimed his liability. He paid upon the allotment, but made default afterwards on the calls. The reason might have been impecuniosity. He did all that he could do to have his name placed on the register of shareholders. *Los*, *Higgs*, and *Martin's Cases* shew that *Alison* and *Campbell* acted in error, and *Alison's Case*, in the Common Pleas, turned upon the question of failure of consideration on the ground of mistake. *Campbell* had paid directors' calls and a balance order, and stood in the same position by mistake, upon the hypothesis that he was bound by his contract. His protest was a most important matter, and his case is different from those cited in reference to not being able to get money back. There is here a *locus penitentiæ*, notwithstanding the 124th section of the *Companies Act*, 1862. There has been a mistake in law within the decisions in *Ebbw Vale Company's Case* (2) and *Ex parte Turnley & Oliver* (3). The other side referred to the case of *Re Saxon Life Assurance Society* (4); but that case shewed that the Court would see right done notwithstanding that the parties had put themselves, through a mistake, in a position which they should not have done. *Stone* v. *Godfrey*, and other cases, have been cited to shew that there can be no restoration unless there has been a mistake in fact; but the principle has been established that mistakes of law can be set right if no one is injured. *Campbell* is not affected by any dealings upon the *Stock Exchange*, and all the reasons in reference to failure of consideration which were applied on *Alison's* behalf in the Common Pleas shew that his name ought to be removed from the list of contributories. No distinction was drawn by the Judges from the circumstance of forfeiture. The only thing noticeable is that the question arose in a different form because

(1) Law Rep. 5 Ch. 63.
(2) Ibid. 112.
(3) Law Rep. 8 Eq. 227.
(4) 2 J. & H. 408.

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of that forfeiture. *Campbell* did that which *Alison* agreed to do, and so long as *Alison's Case* stands this Court is bound by it. The Lord Justice *James* decided on the ground of failure of consideration (1). There was a contract, and moneys were paid for certain things under a mistake, for the directors with whom the contract was made were not in a position to hand those things over, therefore the contract was void; and as *Campbell's* contract stands in the same position as *Alison's*, he is entitled to all that he asked by his summons.

Mr. *Dickinson*, also in reply, submitted that *Croom* was not affected by any balance order, and pointed out that the resolution to wind up voluntarily was passed in December, 1866; that *Croom* made his last payment in April, 1869; that the decision in the Common Pleas (2) was in November, 1870, and that it was confirmed by the Exchequer Chamber in January, 1871 (3). *Croom's Case* is not distinguishable from the case of *Alison*, who voluntarily paid moneys which he had been allowed, upon his summons, to recover back, and the payments which *Croom* made before the liquidation, which was a voluntary one, stood in the same position. All the payments were made by one person to other persons carrying on business, on the assumption that they were partners and that they were proper payments. There can be no distinction between payments made before and after the liquidation.

Mr. *Rowcliffe*, also in reply, for *Hippisley*.

June 2. SIR JOHN WICKENS, V.C.:—

By the terms of the arrangement between the *Imperial Bank* and the *Hindustan Bank*, as communicated to the shareholders of the former by a circular issued by the latter on the 15th of September, 1864, each *Imperial Bank* shareholder was, in effect, offered a *Hindustan Bank* share in exchange for each *Imperial Bank* share, on paying £6 immediately, and £5 more on the 12th of January, 1865.

(1) Law Rep. 15 Eq. 394. (2) Law Rep. 6 C. P. 54.
(3) Law Rep. 6 C. P. 222.

The allotment, it seems, was to be made on application and payment of the £6, the allottee at the same time undertaking to pay the £5 by the 12th of January. But the certificates, as I gather, were not to be issued till the payment of the latter sum. Each *Imperial Bank* shareholder, on taking up his *Hindustan Bank* certificates, was to become entitled to 2*s.* 6*d.* per share as a dividend arising from the *Imperial Bank's* operations before the amalgamation.

Alison, whose case has been already before the Courts (1), applied for shares, paid the £6, and received in October, 1864, notice of the allotment to him. There he stopped. In March, 1866, his shares were forfeited for non-payment of calls. It was held at law that he was not liable to pay calls made before forfeiture, and in this Court (2) that he could recover back the £6 per share with £5 per cent. interest from the date of the summons.

Campbell, the first of the present applicants, did what *Alison* did, and besides, first, paid the £5 per share on the 12th of January, taking up his certificates, and (I infer) receiving the 2*s.* 6*d.* per share; secondly, paid four calls made before the winding-up; thirdly, was put on the list of contributories without objection on his part; and, fourthly, paid to the liquidators, under protest, on the 30th of January, 1871, a sum for which a balance order had been obtained against him.

Alison, it was held, got no shares by the allotment, because the agents of the *Hindustan Bank* had no authority to issue valid shares to him, and was not estopped from contesting the fact that he was a shareholder, either by his letter—which was an acceptance of an offer founded on a direct (though not fraudulent) misrepresentation—or by the payment, which was one act with the letter, or by merely taking no step whatever for a year and a half while he remained on the register. In fact, what passed between him and the *Hindustan Bank* was treated as a contract between them founded on the latter's unintentional misrepresentations: first, that the *Imperial Bank* was effectually merged in the *Hindustan Bank;* and, secondly, that he would become a shareholder in the extended *Hindustan Bank* by complying with certain terms.

The right to set aside (as against the *Hindustan Bank*) a con-

(1) Law Rep. 6 C. P. 222; Ibid. 15 Eq. 394. (2) Law Rep. 15 Eq. 394.

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tract so obtained by a person dealing with it might be waived or released expressly or indirectly, but could not be easily waived by anything which he did or omitted while the falsehood of the representation remained doubtful. Further, it is to be observed that an amalgamation between two large companies is not like a contract between individuals, which can be nullified by consent between them when its validity becomes doubtful or its invalidity is discovered; but exists *de facto* till a competent Court pronounces against it. There appears, therefore, to be some difficulty in holding that as between the two classes of shareholders the mere ordinary discharge of the duties of a partner before May, 1868, would estop any one who was induced to take shares, as *Alison* was, from claiming to have the contract nullified. *Campbell* consequently could hardly be estopped by anything done before May, 1868, when Vice-Chancellor *Giffard* pronounced against the amalgamation (1); that is to say, by the payments made before the winding up, or by allowing himself to be put on the list of contributories, and the payment under the balance order could hardly be material. *Campbell*, therefore, is entitled to have returned to him, with 5 per cent. interest from the date of the summons, what he paid on his shares.

It is not quite clear that the 2*s.* 6*d.* a share, if he received it, or part of it, ought not to be deducted from the payment made in January, 1865; but it seems safer and simpler to treat it as what it was represented to be, viz., profit made by the *Imperial Bank* while in business, but not realized till after the amalgamation, and then accounted for by the *Hindustan Bank* as the *Imperial Bank's* agent.

Hippisley's Case, as regards his five shares, stands on the same footing as *Campbell's*, except that he paid calls in the liquidation after Vice-Chancellor *Giffard's* decree, and without anything in the nature of a protest; but it seems that on the principles already suggested no such payment could amount to an estoppel, if made before November, 1870, when the Court of Common Pleas (2) decided that *Alison* got no shares, or even before January, 1871, when the decision was confirmed by the Exchequer Chamber (3).

(1) Law Rep. 6 Eq. 91. (2) Law Rep. 6 C. P. 54.
(3) Law Rep. 6 C. P. 222.

There are other forty shares which *Hippisley* bought in the market as *Imperial Bank* shares at a discount, half on the 13th and half on the 14th of October, 1864, and in respect of which the vendor transferred *Hindustan Bank* shares, and the question is, whether he is, under these circumstances, entitled to have back what he paid on the amalgamation, and also the sum paid for calls. *Hippisley's Case* is distinct from *Campbell's*, inasmuch as, with regard to these forty shares, he was never a registered shareholder of the *Imperial Bank*. But the transaction by which he became a holder of *Hindustan Bank* shares seems to have been this: that the *Hindustan Bank* treated him as an *Imperial Bank* shareholder claiming the benefit of the amalgamation arrangement, not as a purchaser of *Hindustan Bank* shares in respect of which money was due and to be demanded before registration. *Hippisley's Case* will, therefore, follow *Campbell's*.

Croom held fifty shares in the *Imperial Bank*, which he elected to exchange for *Hindustan Bank* shares, paying £300. These he held for nearly two years, and then on the 17th of July, 1866, sold them to a third person. He afterwards re-purchased them, making a profit by the transaction, and paid (not under protest) the several calls made in the winding-up. *Croom's* vendee was his cousin, and the re-purchase, which was two months after the sale, was of the identical shares which he sold. But *Croom* paid less on re-purchasing than the price he had sold for. And, so far as appears, the contracts were distinct, or, in other words, two sales as distinguished from the avoidance, by mutual consent, of one sale. To test the legal effect of this, it may be asked whether, if there had been no re-purchase, the transferee could have sued the *Hindustan Bank* as *Croom* now seeks to do. This is a question of some importance, as probably affecting numerous cases, and I think must be answered in the negative. For the transfer of a share can hardly vest in the transferee any right of litigation which the transferor might have had in consequence of his having been induced to take the share by the *Hindustan Bank's* misrepresentation, and the *Hindustan Bank's* registration of the transfer, which is all they had to do in the matter, guaranteed (so far as I can see) nothing beyond what the transferee actually got.

On the whole, *Croom's Case* stands no higher than that of his

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transferee would have done if there had been no re-transfer, or, in other words, fails altogether. It is unnecessary to consider whether *Croom's* attendance at two general meetings before the liquidation—a committee meeting of shareholders before the winding-up, but after the presentation of the Petition, and the meeting at which the present liquidators were appointed—would not have been conclusive against him in any view. *Croom's* summons will be dismissed with costs; *Campbell* will have his costs; *Hippisley*, who asked for more than he could possibly claim, will have no costs. The liquidator in the latter two cases will have costs from the estate.

Solicitors: Messrs. *Flux & Co.;* Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *A. W. Rixon;* Messrs. *Thomas & Hollams;* Messrs. *Ashurst, Morris, & Co.*

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L. C. for M. R.

1873

May 29.

[1873 W. 107.]

Railway Company—Working Agreement—Agreement to carry Particular Traffic over Line—Injunction—Arbitration Clause—Railway Companies Arbitration Act, 1859 (22 & 23 *Vict. c.* 59)—*Jurisdiction.*

By an agreement dated the 26th of February, 1866, and afterwards confirmed by Act of Parliament, the Plaintiff company agreed to construct a line of railway between certain termini, and the Defendant company agreed to work it, and during the continuance of the agreement to develope and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or failing such nomination by the Board of Trade on the application of either company in February in each year; and that all such clauses of the Acts of Parliament for the time being in force in regard to railways as should relate to the settlement of disputes by arbitration should, so far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for 999 years from the date thereof. The Plaintiff company constructed the line, and the Defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the Plaintiffs' line by other lines belonging to the Defendant company, and a bill was filed to restrain the Defendant company from so doing:—

Held, on demurrer, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the Court was not ousted; secondly, that the case was one in which the Court could interfere by injunction.

Lumley v. *Wagner* (1) considered.

THIS was a demurrer to a bill by the *Wolverhampton and Walsall Railway Company* against the *London and North-Western Railway Company*, and *Stephen Reay*, their secretary.

By an agreement between the Plaintiff and Defendant companies, dated the 26th of February, 1866, and afterwards sanctioned by Act of Parliament, it was agreed that the Plaintiff company should construct certain lines of railway between *Wolverhampton*

(1) 1 D. M. & G. 604.

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and *Walsall*, in accordance with the provisions of an Act of Parliament therein referred to; and it was amongst other things provided as follows:—

"(9). The railways, branch, or branches, and other works to be constructed under the foregoing clauses, and completed as aforesaid, shall as from the certificate of the Board of Trade of the completion thereof respectively fit for public traffic being obtained, and thenceforth during the continuance of this agreement, be occupied, worked, and managed, and the traffic thereon, and the tolls, rates, and charges in respect thereof, be fixed, regulated, and received, subject to the following clauses, exclusively by the *North-Western Company*, who shall at all times during the continuance of this agreement at their own cost maintain the same and all works and constructions required by the *Wolverhampton and Walsall Company's* said Act, in reference to the railway thereby authorized, in good condition and repair, and (as regards the works and constructions required as last aforesaid) observe and discharge all liabilities and damages under the said Act, or otherwise in reference to the working and maintaining the said railway and works, and shall at the like cost forthwith upon the completion of the said railways, branch, or branches, and other works respectively, stock and provide the same, and at all times during the continuance of this agreement keep the some stocked and provided, with all persons and things necessary or usually provided for the occupation, working, and management of railways, and for the effective carrying of the traffic thereof, and shall at all times during the continuance of this agreement properly and efficiently develop and accommodate both the local and through traffic, whether in passengers, animals, goods, parcels, minerals, or otherwise, on the said railways, branch, and branches, and carry over the *Wolverhampton and Walsall Company's* said authorized railway (varied as aforesaid), first, all such traffic as aforesaid arising between *Walsall* and *Wolverhampton*, and all the places between; secondly, all such through traffic as aforesaid destined for *Walsall*, and passing through *Wolverhampton*, and all such through traffic as aforesaid destined for *Wolverhampton*, and passing through *Walsall*; and, thirdly, all such through traffic as aforesaid arising at *Walsall* or *Wolverhampton*, or intermediate places, for

which the same railway will form the shortest route, so far as public convenience will permit. . . ."

"(18). All questions and differences under this agreement between the companies parties hereto, including the adjusting and adjudicating all traffic, tolls, rates, and charges, shall be determined by a standing arbitrator, who shall be named by the two companies in the month of January in each year, or failing such nomination, by the Board of Trade, on the application of either company, in the month of February, and all such clauses of the Act or Acts of Parliament for the time being in force in regard to railways as shall relate to the settlement of disputes by arbitration, shall so far as applicable, and except as herein otherwise provided, be deemed incorporated with this agreement. . . ."

"(19). This agreement shall continue for the term of 999 years from the date hereof."

The Plaintiff company duly constructed their lines of railway in accordance with the agreement, and the Defendant company took possession, and had since remained in exclusive occupation thereof.

Besides the Plaintiff company's lines, there were three lines of railway between *Wolverhampton* and *Walsall*, all of which belonged to the Defendant company.

The bill alleged that the Defendant company instead of carrying over the Plaintiff's line of railway between *Wolverhampton* and *Walsall* all such local and through traffic as by the agreement they agreed and were bound to carry over the same, had in breach of the agreement carried a large proportion of such traffic between *Wolverhampton* and *Walsall* over their own lines of railway, and had ever since the said agreement came into operation wholly neglected and omitted efficiently to develope and accommodate either the local or the through traffic on the Plaintiff's railway.

The bill prayed for a declaration that according to the true construction of the agreement of the 26th of February, 1866, the Defendant company were bound during the continuance thereof, and ought properly and effectually to develope and accommodate both the local and through traffic, whether in passengers, animals, goods, parcels, minerals, or otherwise, on the Plaintiffs' said railway, and to carry over the Plaintiffs' said railway, first, all such traffic

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as aforesaid arising between *Walsall* and *Wolverhampton*, and all places between; secondly, all such through traffic as aforesaid destined for *Walsall*, and passing through *Wolverhampton*, and all such through traffic as aforesaid destined for *Wolverhampton*, and passing through *Walsall;* and, thirdly, all such through traffic as aforesaid arising at *Walsall* or *Wolverhampton*, or intermediate places, for which the same railway formed the shortest route, so far as public convenience would permit.

The bill also prayed for an injunction to restrain the Defendant company, and their directors, officers, servants, and agents, from carrying over any line or lines of railway other than the Plaintiffs' said *Wolverhampton and Walsall Railway* (first), any local or through traffic, whether in passengers, animals, goods, parcels, minerals, or otherwise, arising between *Walsall* and *Wolverhampton;* or, (secondly), any such through traffic as aforesaid destined for *Walsall*, and passing through *Wolverhampton*, or any such through traffic as aforesaid destined for *Wolverhampton*, and passing through *Walsall;* or, (thirdly), any such through traffic as aforesaid arising at *Walsall*, or *Wolverhampton*, or intermediate places, for which the Plaintiffs' said *Wolverhampton and Walsall Railway* formed the shortest route, so far as public convenience would permit; and for an account of the traffic which the Defendant company ought, according to the said agreement, to have, but which they had not, carried over the Plaintiffs' railway, and of what was due to the Plaintiffs from the Defendants in respect thereof.

The Defendant company demurred.

The bill did not allege that any standing arbitrator had been appointed pursuant to the agreement, and it was admitted at the bar that in fact no such arbitrator had been appointed.

Sir *R. Baggallay*, Q.C., and Mr. *H. A. Giffard*, for the demurrer:—

First: the jurisdiction of this Court is ousted by the joint operation of the 18th clause of the agreement and the *Railway Companies Arbitration Act*, 1859, s. 26 (which Act is incorporated in the agreement by clause 18): *Watford and Rickmansworth Railway Company* v. *London and North-Western Railway Com-*

pany (1). Although no arbitrator has in fact been appointed in accordance with the terms of the agreement, still there is an agreement to refer to arbitration, and that is what ousts the jurisdiction of the Court. The *Railway Companies Arbitration Act*, 1859, s. 6, provides for the appointment of two arbitrators where the companies have not agreed on a single arbitrator, and recourse may be had if necessary to that clause; or it may be that the parties must wait until January or February in next year before they appoint an arbitrator, which would not be an unreasonable stipulation.

Secondly: the bill seeks to restrain the breach of a particular clause of an agreement of which as a whole the Court will not enforce specific performance; and under these circumstances the Court will not interfere, but leave the parties to their remedy at law: *Johnson* v. *Shrewsbury and Birmingham Railway Company* (2); *Brett* v. *East India and London Shipping Company* (3); *Blackett* v. *Bates* (4); unless, indeed, there is a negative stipulation in the agreement, capable of being isolated, so as to form a distinct contract: *Lumley* v. *Wagner* (5). There is no such stipulation here. Moreover, even in the last-mentioned class of cases, the Court does not interfere unless it could do complete justice between the parties: *Pollard* v. *Clayton* (6); and how could the Court ascertain here whether, for example, the Defendant company was properly developing the local traffic? If the Court attempted this, it would have to superintend the working of the line for 999 years.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Fry*, Q.C., and Mr. *Speed*, for the Plaintiffs, were not called upon.

LORD SELBORNE, L.C.:—

I am clearly of opinion that this demurrer must be overruled. With respect to the point about the arbitration, the burthen of excluding the jurisdiction of the Court rests on the Defendants. There are authorities undoubtedly which shew that an arbitration

(1) Law Rep. 8 Eq. 231.
(2) 3 D. M. & G. 914.
(3) 2 H. & M. 404.
(4) Law Rep. 1 Ch. 117.
(5) 1 D. M. & G. 604.
(6) 1 K. & J. 462.

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clause may exclude the jurisdiction; I am far from saying that it might not be argued on this clause, confirmed as it is by an Act of Parliament, that it would exclude the jurisdiction; but I am not called on to give a judicial opinion on that point, because really the facts do not raise it. The clause expressly provides for the settlement of differences in a particular manner, "by a standing arbitrator," that is, a single arbitrator "who shall be named by the two companies in the month of January in each year, and failing such nomination, by the Board of Trade on the application of either company, in the month of February." It is clear that the Board of Trade can have no jurisdiction, except in the terms in which it is given, and that is on the application of either company in the month of February. The bill does not allege that any such standing arbitrator exists, or has been appointed according to that part of the agreement; and so far as one may go out of the bill, I see no reason to suppose that by amending the bill the existence of such an arbitrator could be shewn. That being so, there is no agreement that I can find to refer to any one, except such a standing arbitrator; and it would be a most unreasonable construction of such a clause, to suppose that it excludes the jurisdiction of the ordinary Courts of Law and Equity, except in the case in which it substitutes for them the jurisdiction of the arbitrator for which it provides. The reference to the clauses in the general Act of Parliament with reference to railway arbitrations is only that they shall be considered as incorporated in this agreement, so far as applicable, and except as otherwise provided. This appears to me to exclude entirely the application of the clause to which Mr. *Giffard* referred, to the effect that where the companies have not agreed to refer to a single arbitrator, then arbitrators more than one may be appointed in the particular manner there mentioned. Here there is an agreement to refer to a single standing arbitrator; and the one company is just as much to blame as the other if that mode of settling the difference has not been kept alive in the way intended between them.

Then, with regard to the argument, that upon the principles applicable to specific performance no part of the relief asked by this bill can be granted, I cannot help observing, that there is some fallacy and ambiguity in the way in which in cases of this

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kind those words "specific performance" are very frequently used. There is a class of suits in this Court, known as suits for specific performance of executory agreements, which agreements are not intended between the parties to be the final instruments regulating their mutual relations under their contracts. We call those executory contracts as distinct from executed contracts: and we call those contracts "executed," in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose. The common expression, "specific performance," as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. Of course if you pass from the technical to the etymological effect of the words, "specific performance" might signify any direction given by the Court for the doing of anything whatever in specie; and I cannot help thinking that in this class of cases a little confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions which have arisen as to the propriety of the Court requiring something or other to be done in specie. There is a considerable class of contracts, such as ordinary agreements for work and labour to be performed, hiring, and service, and things of that sort, out of which most of those cases have arisen, which are not in the proper sense of the words cases for "specific performance;" in other words, the nature of the contract is not one which requires the performance of some definite act such as this Court is in the habit of requiring to be performed by way of administering superior justice, rather than leave the parties to their rights and remedies at law. It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders, and a general superintendence, which could not conveniently be undertaken by any Court of Justice; and therefore contracts of that sort have been ordinarily left to their operation at law.

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With regard to the case of *Lumley* v. *Wagner* (1), to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made, that if you find the word "not" in an agreement—"I will not do a thing"—as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative. But that class of cases, in which the Court has striven to enlarge rather than to narrow its jurisdiction, seems to me to have no application at all in a case like this, where there is an agreement in substance for the lease of a line of railway, not like *Johnson* v. *Shrewsbury and Birmingham Railway Company* (2), which was merely a contract by the railway company remaining in possession of their line, with their contractor, to supply the things necessary for its working, and that terminable by notice, which notice they had given, whether rightly or wrongly; nor like the case of *Blackett* v. *Bates* (3), where there was a lease executed of a wayleave, without any covenant on the subject concerning which the disputes between the parties afterwards arose; though there was an agreement which, under those circumstances, must be regarded simply

(1) 1 D. M. & G. 604. (2) 3 D. M. & G. 914.
(3) Law Rep. 1 Ch. 117.

as concurrent and collateral, and not part of the terms of the lease, for the supply of engine-power, and for the repair of the line belonging to the party who was to make the repairs. The Court thought, and probably it was quite right in thinking, that those were not matters for specific performance proper, and that they were not matters in which a more complete or convenient or just remedy could be given in this Court than in a Court of Law.

But here you have an agreement confirmed by statute, in other words an Act of Parliament, vesting practically for ever (for 999 years), the line of the Plaintiff company, on certain terms, in the Defendants. The Defendant company are in possession; nothing whatever remains to be done to complete their railway, nor can they be ousted from it. The only question is, whether, being in possession under that Act of Parliament for that period of time, they are or are not at liberty to depart from the terms on which it was stipulated that they should have that possession. I do not think that any of the questions, or any of the difficulties which arose in those other cases, at all apply to a case like this. If the Defendants are not using the line as they promised to use it, it appears to me that the other party, who is out of possession by virtue of this Parliamentary agreement, is quite at liberty to come to this Court, and to ask that they may be compelled to use the line as they agreed, provided the Court sees its way to define that which they ought, or ought not, to do. I therefore think this demurrer must be overruled in the usual way.

Solicitors: Mr. *R. F. Roberts;* Messrs. *Baxter, Rose, & Norton.*

L. C. for M. R.

1873

June 2.

In re TEAPE'S TRUSTS.

Will—Limited Power of Appointment—General Bequest to Object of Power—Payment of Debts.

A testator, having a limited power to appoint the income of £5000 consols to his wife for her life, and having no other power, by his will, which contained no reference to the power, after first directing payment of his debts and funeral expenses, devised and bequeathed the residue of his estate belonging to him at the time of his decease, or over which he might have any power of disposition or control, to his wife her heirs, assigns, and legal representatives for ever in full property :—

Held, that the power was well exercised.

Clogstoun v. *Walcott* (1) not followed.

17 Eq 406
20 Eq 602-3-4
5 Ch D 506
12 Ch D 871

PETITION.

Hananiah Teape by his will, dated the 25th of March, 1865, gave the sum of £8500 consols to his executors upon trust to pay the income thereof to his son *Theodore Teape* for his life, and after his death upon trust to pay to any wife with whom his said son *Theodore Teape* might intermarry, who should survive him, so much of the income of £5000 consols, part of the said sum of £8500 consols, for her life, as the said *Theodore Teape* should by any deed or by his last will and testament legally executed direct or appoint, and subject to such appointment (if any), or in case no such appointment should be made, the testator declared trusts of the said sum of £8500 consols in favour of the children and issue of the said *Theodore Teape*, as in the said will mentioned.

The testator died on the 7th of July, 1868.

Theodore Teape made his will, dated the 14th of November, 1871, which, so far as material, was as follows :—

"I will, order, and direct that as soon as possible after my decease my just debts and funeral expenses be first fully paid. After the payment of my just debts and funeral expenses I give, devise, and bequeath the rest, residue, and remainder of my real and personal, moveable and immoveable properties and estate, of what kind, nature, and description soever the same may be composed, to whatsoever the same may amount, and wheresoever situate,

(1) 13 Sim. 523.

lying, and being, the same may be found to me belonging at the time of my decease, or to which I may be in anywise entitled, or over which I may have any power of disposition or control, unto my wife *Mary Monaghan* and to her heirs, assigns, and legal representatives in full property for ever, to have and to hold the same and every part thereof unto my said wife the said *Mary Monaghan* and to her heirs, assigns, and legal representatives, from the day of my decease thenceforth for ever in full property, and the same to be by her or them received, recovered, used, enjoyed, and disposed of as she or they may deem best, I, the said testator, hereby making my said wife my sole and universal devisee and legatee."

No power of appointment other than the power conferred upon him by the will of the said *Hannaniah Teape* was vested in the said *Theodore Teape* at the time of his death.

On the 31st of January, 1873, *Theodore Teape* died.

The fund having been paid into Court, the present Petition was presented by the widow of *Theodore Teape*, who prayed that she might be declared entitled as from the death of her late husband, and during her life, to the income of the said sum of £5000 consols.

The question was, whether the residuary bequest in the testator's will was a valid exercise of the power of appointment.

The Petition was opposed by the persons entitled in default of appointment.

Mr. *Waller*, for the Petitioner:—

In this case the testator directed his trustees to pay to the wife of his son *Theodore Teape*, during her life, so much of the income of the sum of £5000 consols as the said *Theodore Teape* should by deed or will appoint. This power was duly exercised by the residuary gift in the will of *Theodore Teape*, who bequeathed to his wife all the property over which he had any power of disposition or control. The intention must be collected from the whole will, as in *Bailey* v. *Lloyd* (1), where a testator was held, upon the whole will, to have shewn an intention to execute a power of appointment over certain estates, though he directed part of the proceeds

(1) 5 Russ. 330.

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of the sale of the estates to be applied to purposes not warranted by the power.

In *Pidgely* v. *Pidgely* (1) a general bequest of personalty, with a reference to all property over which the testator had a power of appointment, was held to operate as an execution of the power. Here the testator has given, in the widest terms, all the property he possessed, or over which he had any power of disposition.

In *Cowx* v. *Foster* (2) a testator, having a power to appoint realty among children, devised and bequeathed "all my real and personal estate whatsoever, whereof I have any power to dispose," upon trust to sell and apply the proceeds of the realty and the personalty in payment of his debts, funeral and testamentary expenses, and then upon trust for his children. It was held that there was a sufficient indication of his intention to appoint.

Upon the principle of these cases I submit that there was such an indication here, and that the Petitioner is entitled to a life interest in the income of the £5000 consols.

Mr. *Southgate*, Q.C., and Mr. *Field*, for the Respondents, who claimed in default of appointment:—

This was not a general power of appointment, but a special power, so that the case is not within sect. 27 of the *Wills Act*. The cases cited on behalf of the Petitioner fail to support her contention. In *Bailey* v. *Lloyd* (3) the views given in the judgment are not applicable to the present case. *Cowx* v. *Foster* was a case of real estate.

In *Clogstoun* v. *Walcott* (4) a testatrix, having a testamentary power of appointment in favour of her children over certain sums of stock, by virtue of every power enabling her in that behalf, appointed all the property of which she was then, or at the time of her death should be, possessed or entitled, or have power to dispose, to *A.* and *B.*, upon trust, after payment of her debts and funeral and testamentary expenses, to invest the residue thereof, and she then declared trusts in favour of her children: it was held that her will was not an exercise of the power. If that case is sound law it is conclusive as against the present petitioner.

(1) 1 Coll. 255.
(2) 1 J. & H. 30.
(3) 5 Russ. 330.
(4) 13 Sim. 523.

In *Elliott* v. *Elliott* (1), which was a somewhat similar case, it was held that the residuary clause of the will then in question was a valid appointment of the fund which the testatrix in the cause had power to appoint; but the Vice-Chancellor considered that the case was distinguishable from *Clogstoun* v. *Walcott* (2), and that the two decisions were consistent. In *Ferrier* v. *Jay* (3), however, Vice-Chancellor *Malins* declined to follow *Clogstoun* v. *Walcott*. In *Hope* v. *Hope* (4) Vice-Chancellor *Stuart* observed: "Where vague and general words of reference to all powers are found among words of general gift and bequest of a testator's own property, and are satisfied, as in the present case, by the existence of any power relating to the testator's own property, I know no authority that can justify the application of such words to a special and limited power over property derived from another source."

In *Cooke* v. *Cunliffe* (5) a devise of "all my real estate over which I have any disposing power" was held not to operate as an execution of a limited power of appointment vested in the testator when there was no sufficient reference to the subject-matter of the power.

In each case it is a question of intention to be derived from the whole instrument. Here the testator does not refer to the subject-matter of the property nor to the power. He first directs that his debts and funeral expenses are to be paid, and then, after payment of his debts and funeral expenses, he gives the residue of the property to which he may be entitled, or over which he may have any disposing power, to his wife. Then follow words which clearly shew that he did not mean merely to give her the income of a fund—"unto my wife, and to her heirs, assigns, and legal representatives, in full property for ever, to have and to hold the same and every part thereof unto my said wife, and to her heirs, assigns, and legal representatives for ever, in full property."

We submit that these words are not applicable to property over which he had a limited power of appointment, but to that in which he had an absolute estate and interest.

Mr. *Chamier* for the trustees.

(1) 15 Sim. 321.
(2) 13 Ibid. 523.
(3) Law Rep. 10 Eq. 550.
(4) 5 Giff. 13, 24.
(5) 17 Q. B. 245.

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LORD SELBORNE, L.C.:—

I think the Petitioner is entitled to the income of the fund.

In this case the direction in the will for payment of the testator's debts and funeral expenses is separate from the rest of the will, and imports an intention that the debts and funeral expenses should be first paid out of the testator's own property before anything else is done. The question is, whether there is sufficient evidence of an intention to exercise the power. There is nothing on which the words "over which I may have any power of disposition or control" can operate, except the life interest in this sum of £5000 Consols; and the Court cannot reject these words, when the widow, the object of the power, is the person intended to take. The testator first makes use of the words, "the rest, residue, and remainder of my real and personal, moveable and immoveable properties and estate," which were large enough to include everything that was his own; and he adds, "or over which I may have any power of disposition or control"—words applicable to any power of appointment he might possess, but which I am asked not to apply to the only power he actually had.

The only difficulty is, that the testator's only power was to appoint a life interest; whereas the words he used, "To my wife, her heirs and assigns and legal representatives, in full property for ever," seem at first sight applicable only to the entire interest. But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of; and, if that was a terminable interest, she will take it to the full extent of his disposing power, which, in this case, was for her own life.

I think all the authorities are consistent with this view of the case except *Clogstoun* v. *Walcott* (1). But I do not think that case can be reconciled with *Elliott* v. *Elliott* (2), or with *Cowx* v. *Foster* (3), to say nothing of *Ferrier* v. *Jay* (4); so that case creates no difficulty. There is still less difficulty from the case of *Hope* v. *Hope* (5), for, though there were some words in the judgment which went beyond what was needed for the decision of that case,

(1) 13 Sim. 523.
(2) 15 Ibid. 321.
(3) 1 J. & H. 30.
(4) Law Rep. 10 Eq. 550.
(5) 5 Giff. 13, 24.

yet there were sufficient grounds for the decision there arrived at, without affecting the principle on which the present case is to be decided.

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I therefore hold that the Petitioner is entitled to the income of the £5000 Consols during her life.

Solicitors for the Petitioner: Messrs. *Deane & Chubb.*
Solicitor for the Respondents: Mr. *Greenway Robins.*

PATENT MARINE INVENTIONS COMPANY *v.* CHADBURN.

L. C. for M. R. 1873 *June* 6.

[1872 P. 180.]

Practice—Patent—Issues—Mode of Trial—Lord Cairns' Act (21 & 22 *Vict.* c. 27)—*Sir John Rolt's Act* (25 & 26 *Vict.* c. 42).

In the absence of special circumstances the ordinary issues in a patent suit will be tried before the Court itself without a jury.

THIS was a suit to restrain the infringement of a patent. The parties had agreed upon certain issues (being the ordinary issues in a patent suit) to be tried in the cause, but they differed as to whether these issues should be tried with or without a jury.

Mr. *Fry*, Q.C., and Mr. *Brodrick*, for the Plaintiffs, now moved that the issues should be tried either before the Court itself with a jury or else before a Court of Law.

Under the old practice the Court used to send issues to be tried at law, where the Plaintiff had the benefit of a jury, and though under the practice introduced by *Lord Cairns' Act* (21 & 22 Vict. c. 27) and *Sir John Rolt's Act* (25 & 26 Vict. c. 42), the Court may try the issues itself, still the Plaintiff is not to be deprived of the benefit which he formerly had of having the question decided by the verdict of a jury: *Eaden* v. *Firth* (1); *Davenport* v. *Goldberg* (2).

Mr. *North*, for the Defendants, asked that the issues might be tried before the Court itself without a jury, as provided by *Lord*

(1) 1 H. & M. 573. (2) 2 H. & M. 282.

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PATENT MARINE INVENTIONS COMPANY v. CHADBURN.

Cairns' Act, s. 5. A Plaintiff is not entitled to have the issues tried by a jury. The Plaintiff was formerly entitled to have the issues tried at law and not in this Court, and trial by jury was merely an incident of the trial at law. Now the duty is imposed on this Court of trying the issues itself, and the Court must try the issues according to its ordinary course of practice. In *Bovill* v. *Hitchcock* (1) Lord *Cairns*, after having had *Eaden* v. *Firth* (2) and *Davenport* v. *Goldberg* (3) brought to his attention, said this: "If the Court thinks it best that a question should be tried before a jury, a jury can be had; but if, in the opinion of the Court, a trial without a jury is preferable, neither party can claim a jury as a matter of right. It is a fallacy to say that under the old practice the Court required a legal question to be tried by jury. What it required was the judgment of a Court of Common Law. In most cases it was a necessary incident to proceedings at law that there should be the verdict of a jury before judgment; but these cases were sent to law, not that they might be tried by jury but because this Court had no jurisdiction to decide upon legal rights." *Roskell* v. *Whitworth* (4) is an authority to the same effect.

Mr. *Fry*, in reply.

LORD SELBORNE, L.C.:—

I should have been better pleased if the parties could have agreed upon the mode of trial in this case, because it is never quite a satisfactory thing to decide *à priori*, before one is in possession of the case, how it can best be tried. You cannot rehearse a case for the purpose of determining that. If the parties do not agree, you cannot have the benefit of the knowledge which they themselves have. But being obliged to decide this, I confess my opinion is, like Lord *Cairns*', that in these patent cases, where all the ordinary issues are raised, and nothing special appears to shew that the assistance of a jury is wanted on some mere question of fact properly so called, trial by jury is not ordinarily the most convenient mode of trial.

It is to be observed, that such cases almost always involve questions of law and fact, not only mixed, but mixed in such a way as

(1) Law Rep. 3 Ch. 417, 419.
(2) 1 H. & M. 573.
(3) 2. H. &. M. 282.
(4) Law Rep. 5 Ch. 459.

makes the extrication of them extremely difficult; secondly, that very often much must depend upon the construction of documents, as to which a jury must take their direction entirely from the Judge; thirdly, that much of the evidence, or that which is permitted to be given as evidence in such cases, is argumentative and relative to matters of opinion, so as to make it extremely hard even for the Judge himself to keep it under proper control; and lastly, that even the questions of fact are often, to a very great extent, questions of science, which, to say the least, are as likely to be as well decided by a Judge as by any jury. It very rarely happens, if it ever does, that in such cases the practical work is not done by the Judge. It very rarely happens, if it ever does, where the thing is not reduced to a narrow question of fact, that the jury do not simply follow, after a very elaborate discussion of the case by the Judge, the direction of the Judge. If, therefore, I am obliged to decide in so naked a way the preliminary question whether, in all such cases as these, I should, upon an application like the present, direct a trial by jury, I am unable to say that I should do so. Therefore, my direction is, that the trial take place before this Court without a jury.

Solicitors: Messrs. *F. Venn & Son*, agents for Messrs. *Anderson, Collins, & Robinson, Liverpool;* Mr. *W. W. Wynne*, agent for Messrs. *Simpson & North, Liverpool.*

In re ACCIDENTAL DEATH INSURANCE COMPANY.

ALLIN'S CASE.

Amalgamation of Companies—Resuscitation of Company—Transfer of Shares—Sanction of Directors—Winding up—Contributory.

The deed of settlement of a company provided that when a shareholder wished to transfer his shares he should leave a notice at the office of the company, and that the directors should consider the proposal and signify their acceptance or rejection of the proposed transferee; and that, if they should reject the proposed transferee, and should not within fourteen days procure some other person to take the shares at the market price, the proposed transferee should be considered as approved by the directors, and should be entitled to take the transfer accordingly.

The company agreed with the *M. Corporation* for a transfer to it of the

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46 Ch Cas 570
573
46 Ch Cas 619
25 W R 125
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company's business, and that the shareholders should be entitled to exchange their shares for shares in the corporation, but there was no formal winding-up of the company. This agreement was acquiesced in by all the shareholders. About a year afterwards the former directors, in the name of the company, entered into an agreement with the corporation that the former agreement should cease, and that the company should resume the principal part of its business. Notice of this resumption of business was given to the shareholders. Shortly afterwards the corporation was wound up. Subsequently, pending an arrangement purporting to relieve from liability certain dissatisfied shareholders, *A.*, the registered holder of 200 shares in the company, transferred them to *P.* for a nominal consideration after giving notice to the directors, and at a meeting of the directors at which *A.* (who was alleged to have been elected a director though not as the deed required) was present, the said transfer was sanctioned. The company was afterwards wound up:—

Held, that, under the circumstances, the transfer was invalid, and that *A.* must be made a contributory.

Chappell's Case (1) followed.

THIS was an application on behalf of *George Allin*, that his name might be removed from the list of contributories of the *Accidental Death Insurance Company* in respect of 200 shares.

The facts of the case, which was very similar to *Chappell's Case* (1), were as follows:—

The deed of settlement contained certain provisions as to the transfer of shares in clauses 19, 20, 21, and 22, which, so far as material, were as follows:—

19. "That the person appearing in the company's register of shareholders to be the holder of any share or shares, and no other person, shall be entitled (subject to the regulations and in the manner hereinafter expressed) to sell and transfer any such share or shares to any person whomsoever (not being an infant, lunatic, married woman, or under legal disabilities), and to any body politic or corporate legally capable of holding any such share.

20. "That when any person entitled to any shares in the company, whether in his own right or otherwise, shall have procured some other person willing to become a shareholder in respect of all or any of the shares to which he shall be so entitled, he shall propose such other person as a shareholder by leaving at the principal office or place of business of the company a notice in writing to that effect under his hand, which shall state the name

(1) Law Rep. 6 Ch. 902.

and residence of the proposed shareholder, and the number of each share intended to be transferred to such proposed shareholder.

21. "That whenever any such proposal as hereinbefore mentioned shall have been made the directors shall forthwith take the same into consideration, and shall under the hands of two of their number, or of the managing director or secretary of the company, notify to the person making such proposal their acceptance or refusal thereof, and whether as to all or some only of the shares intended to be transferred, and in the latter case as to how many and which of the shares intended to be transferred such acceptance shall extend, and the person so proposed shall (if accepted as to any share intended to be transferred) be thenceforth considered as approved by the directors, and entitled, upon the transfer to him of the same share, and upon the execution of the instrument of transfer, to be registered in manner aforesaid as a shareholder in respect of the shares for which he shall be so accepted, and if any person who shall have been proposed to become a shareholder shall be rejected as aforesaid, and the directors shall not within fourteen days procure some other person or persons to take the share or shares proposed to be transferred at the market price for the time being, in such case the person or persons so proposed shall be considered as approved by them, and be entitled to take such transfer accordingly and in manner aforesaid.

22. "That any transfer or pretended transfer of shares not being approved of by the directors under the last preceding clause shall be absolutely void, and the then registered holder of the shares therein expressed to be transferred shall continue to be the holder in respect thereof to all intents and purposes."

The deed also provided that a general meeting of the shareholders of the company should be held every year, when the vacancies in the board of directors were to be filled up. It also contained clauses providing for the dissolution of the company.

The company having purchased the business of the *Accidental Death Insurance Company*, adopted the name of that company under an Act of Parliament passed on the 18th of April, 1859.

By an agreement of the 1st of July, 1865, the company was amalgamated with and its business transferred to the *Accidental and Marine Insurance Corporation, Limited*, and the shareholders

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in the company became entitled to shares in the corporation in exchange for their shares in the company. This amalgamation was not authorized by any provisions in the deed of settlement, but was assented to by all the shareholders.

On the 5th of August, 1865, the corporation was registered under the *Companies Act*, 1862.

On the 9th of October, 1866, a deed for resuscitating the *Accidental Death Insurance Company* was executed by the former directors of the company in the name of the company, and by the corporation, by which it was declared that the agreement of the 1st of July, 1865, should cease to operate, and that the *Accidental Death Insurance Company* should resume its business as to insurance for accidental deaths, and should indemnify the corporation in respect of all past and prospective risks on account of such insurances.

On the 10th of October a circular was issued to the shareholders of the company announcing the resumption of business by the company.

On the 12th of October, 1866, two days after the said circular was issued, a petition was presented for winding up the corporation, but before any order was made the shareholders resolved on a voluntary winding-up, and on the 3rd of November, 1866, a supervision order was made.

On the 23rd of October, 1866, a meeting of the former directors of the company was held, at which certain transfers of shares were passed, for a nominal consideration, to Mr. *Montgomery*, including a transfer of 2145 shares belonging to *F. J. Chappel*, the solicitor of the company.

At that time the applicant, *George Allin*, who had assented to the agreement of the 1st of July, 1865, was the registered holder of 200 shares in the company, and at a meeting of the directors, held on the 27th of March, 1867, the directors then present elected *Allin* and three other persons directors of the company. It was admitted that such election was not authorized by the deed of settlement, and was not sanctioned by the shareholders, as no general meeting of the company had been held after the agreement of the 1st of July, 1865.

On the 28th of March, 1867, *W. G. Lankester* and other shareholders of the company presented a petition for its winding-up;

but it was withdrawn, in consequence of an arrangement called the "*Southampton* Compromise," made between the shareholders who presented the said petition and the directors of the company, under which the said shareholders were to be relieved from all liability on their shares upon their paying 10*s.* per share to the company, and transferring their shares to *H. Proctor*, a nominee of the directors, who received £10 for accepting them.

On the 1st of April, 1867, *Allin* gave written notice to the directors of the company that he intended to propose *Robert Pocock* as a transferee for the 200 shares standing in his name, and on the same day he executed a transfer of the said shares to *Pocock* for a nominal consideration.

On the 31st of May, 1867, a meeting of the directors of the company was held, when it appeared by the minute book that *Allin* was present, and that the following proceedings took place relating to the transfer of shares:—"Proposals for the transfer of the undermentioned shares having been previously submitted and approved, it was resolved that the following transfers be and the same are hereby approved and ordered to be registered."

Then followed the names of thirty-eight shareholders included in the *Southampton* Compromise, the name of their transferee, and the number of shares transferred; and then, amongst others, "*G. Allin* to *R. Pocock*, 200 shares."

By a deed dated the 31st of May, 1867, six of the directors covenanted the shareholders included in the *Southampton* Compromise against all liability in respect of their shares.

Allin, in his affidavit, stated that he did not recollect whether he was present at the meeting of the 31st of May, but he certainly did not act as a director of the company; nor did he then know of the *Southampton* Compromise; nor was he a party to any deed of covenant or otherwise relating to such compromise.

On the 30th of March, 1868, another petition to wind up the company was presented; on the 3rd of April, 1868, a resolution to wind up voluntarily was passed; and on the 15th of April, 1868, it was ordered that the voluntary winding-up be continued under the supervision of the Court.

On the 7th of July, 1873, in *Lankester's Case* (1), Lord Justice

(1) Law Rep. 6 Ch. 905, n.

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James, affirming an order of the Master of the Rolls, held that the transfers of the shares under the *Southampton* Compromise were invalid.

On the 5th of August, 1871, in *Chappell's Case* (1), an order of the Master of the Rolls, directing that *Chappell's* name should be retained on the list of contributories of the company, was affirmed by the Lords Justices on appeal; Lord Justice *Mellish*, however, dissenting from the opinion of Lord Justice *James*.

Allin's name having been put on the list of contributories, he now applied on an adjourned summons to be removed.

Mr. *Cookson* (Sir *R. Baggallay*, Q.C., with him), for the applicant, contended that this case was distinguishable from *Chappell's Case*, and asked the Court to follow the judgment of Lord Justice *Mellish* (2). He referred to *Sichell's Case* (3), *Weston's Case* (4), *Fyfe's Case* (5), *Nation's Case* (6), and *Shepherd's Case* (7).

Mr. *Southgate*, Q.C., and Mr. *Graham Hastings*, for the liquidator, were not called on.

LORD SELBORNE, L.C.:—

As far as my opinion goes, I agree with the decision in *Chappell's Case*. The position of Mr. *Chappell* was that of a man who knew everything that had happened in the company. He was the solicitor of the company, and he transferred a great number of shares at a meeting constituted by persons taking upon themselves to act and to allow transfers at a time when, not under resolutions of general meetings, but under arrangements made by the directors, and assented to by every individual shareholder, the company had ceased to carry on business, and was no longer a going concern for the purposes contemplated by the deed of settlement. My opinion being in that respect with Lord Justice *James*, though I have the misfortune to differ from Lord Justice *Mellish*, I think the transfer clauses of this deed of settlement were in-

(1) Law Rep. 6 Ch. 902.
(2) Ibid. 908.
(3) Ibid. 3 Ch. 119.
(4) Law Rep. 4 Ch. 20.
(5) Ibid. 768.
(6) Ibid. 3 Eq. 77.
(7) Law Rep. 2 Ch. 16.

tended to be in operation together with the other clauses of the deed of settlement, and while the company was carried on as a going concern, for the purposes of the common agreement; and that they were not intended to be in operation for the purpose of enabling individuals to escape from liability when the company had ceased to be a going concern, and when the general clauses of the deed, the clauses of management, and the other powers of the directors to make calls for the purposes of a going concern, and so forth, were no longer capable of being acted upon.

In *Brotherhood's Case, In re Agriculturist Cattle Insurance Company* (1), it was held, distinguishing that case from *Spackman's Case* (2) and others in the same company, that, although there was no regular dissolution, yet where the evidence warranted the conclusion that every individual shareholder assented to an arrangement not otherwise binding, then it became a binding arrangement. Here every individual *primâ facie* is shewn to have assented; and the effect of that assent was, it appears to me, inconsistent with the subsequent arrangement for again carrying on the company as a going concern; because the agreement of the 1st of July, 1865, provided not merely that the corporation should have the benefit of all the assets of every kind, and undertake all the liabilities, but also that they should have the business and the goodwill, and the benefit of the name of the company. It is quite clear, that to go on with the business under those circumstances would have been inconsistent with the agreement to which every individual had assented; and the point upon which I respectfully find a difficulty in agreeing with Lord Justice *Mellish* is this, that Lord Justice *Mellish* seems to have thought that the transfer clauses could remain in operation when they were severed from the rest of the deed, and when the rest of the deed became, as to the future, inoperative by the agreement of every individual shareholder of the company. I look upon the transfer clauses as part of the general scheme, and not to be separated from it.

Furthermore, it appears to me that Mr. *Allin* must be taken to have intentionally abstained from offering to the Court any explanation of these circumstances;—that upon the 27th of March, 1867, the persons then acting as directors at a meeting purported to

(1) 31 Beav. 365. (2) 1 Mac. & G. 170.

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elect him as a new director; that on the 4th day after that he gave notice to transfer his shares; and that on the 21st of May the next board meeting was held after that election; that whatever its effect would have been, he appears by the minute book to have been present as a director; and as it was a meeting of the directors, that is, of the acting directors, I know of no other character in which he could be present. The book by the Act of Parliament is made *primâ facie* evidence: and he does not venture to deny his presence, although he says he did not act as director. That may mean, that he took no active part in the business done; but a part of the business was the transfer of a large number of shares. I lay no stress upon the fact, that most of them had reference to what is called the "*Southampton* Compromise," his own shares being among the number transferred. He offers no explanation of the fact, that he is made nominally a director four days before the notice to assign his shares, and attends as a director at the meeting held for the purpose, among other things, of assenting to the assignment of his own shares. I must attribute to him at least full knowledge of the fact, that the board of directors was subject to this exception, that it had not been kept up and constituted in the manner contemplated by the deed, and particularly, among other things, for the purpose of approving of transfers; because the deed did not intend to leave to the acting directors for the time being the sole power of filling up the direction according to their own will and pleasure, but it contemplated that at least once in every year a general meeting should be held, for the purpose of appointing a certain proportion of the body of directors. That had not been done after the agreement of 1865. In 1866 there had been no such meeting held, and no such directors appointed. The reason is manifest, because the company had ceased to be a going concern; and upon this evidence I think myself not only warranted, but obliged, to impute to Mr. *Allin* knowledge in that respect of the actual position and constitution of the board of directors, as well as of the company.

I think that these clauses do not give an absolute and unlimited power of transfer, but that they give a limited power of transfer. I should not like to lay stress upon the expression found in the clause which in terms gives the power of transfer;

but I cannot help noticing, that the power is given in these words, "that the person appearing on the company's register of shareholders to be the holder of shares, and no other person, shall be entitled, subject to the regulations and in the manner hereinafter expressed, to sell and transfer." It does not speak there of transfer apart from sale, but of transfer on the occasion of sale. I think that goes some way to negative the idea that it was intended and contemplated by the parties to this contract, that there should be transfers for the sole and mere purpose of getting rid of liability, although it certainly was contemplated that, when there was a regular transfer, liability should cease. The deed then provides (in the 21st clause) that notice should be given of the intended transferee, and then it says that the directors may accept or refuse. If there had been nothing more than that in the 21st clause, it would have been manifest that they might have arbitrarily refused; but it is qualified in favour of the shareholder by what follows; and I think the qualification must be strictly construed; that is, that if a person proposed as a shareholder shall be rejected, and the directors shall not within the fourteen days procure some other person or persons to take the shares at the market price, then he shall be considered as approved.

Supposing (it is not what actually happened in this case) that there had been a regular board of directors, and that this transfer by Mr. *Allin* to *Pocock*, in the circumstances in which it was made, and being such as it is, was proposed to the board of directors, and that they had refused it, could it be said that they were bound to propose a person to take the shares instead of a man admitted to be a man of straw, and who had paid no market price, unless there was a market price at which a purchaser could be found? I am not disposed to think that they would have been held to have approved of the transfer in that state of things. The answer would be, if there be a market price he is not to lose it; and the clause contemplates a right of the directors to substitute a shareholder of their own selection who is willing to give the market price; but where that state of things is not possible, the company being in a known condition of ruin and insolvency, I am by no means prepared to agree to the proposition that the words, "at the market price," are mere surplusage, or mere

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directory matter. They seem to me to indicate the terms and conditions on which, if the substitution does not take place, a constructive approval shall be imputed to the board of directors; and if these terms and conditions are, from the nature of the case, the company no longer going on for profitable purposes, incapable of being fulfilled, I find nothing in that clause which says, that, under those different circumstances, a transfer refused shall be deemed to be approved. The next clause expressly says that unless the transfer is approved under the preceding clause it shall be absolutely void.

I make these observations merely for this purpose, that the clauses appear to me to be very different from those which would be found in a deed giving an unlimited and unqualified power of transfer. There is a duty to be performed by the directors; and, for this purpose, a meeting of such a board of directors is to be held as the deed contemplated; and in this case, although there was no refusal and no substitution, there was no such board. I therefore not only think myself bound in this case to follow the decision in *Chappell's Case* (1), but I also agree with it.

Solicitor for the Applicant: Mr. *A. Beddall.*
Solicitors for the liquidator: Messrs. *Harper, Broad, & Battcock*

L. C. for M. R. 1873 *June* 26.

FALKNER *v.* SOMERSET AND DORSET RAILWAY COMPANY.

[1872 F. 98.]

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 92, 93—*House or other Building—Market Garden.*

22 LJ D 45

A piece of land, 2A. 2R. 20P. in extent, situate in the neighbourhood of but not within the city of *Bath*, was surrounded by a ring fence, and had for many years been used as a market-garden. About twenty-five years ago a cottage, consisting of three rooms nine feet in height, with two cellars suitable for storing fruit and vegetables, was erected near a road forming part of the boundary of the land for the purpose of being occupied by the tenant of the

(1) Law Rep. 6 Ch. 902.

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garden. A railway company drove through this piece of land a tunnel which passed under one corner of the cottage, and divided the land into two portions, one of which was less than half an acre:—

Held, that the company were not bound to take the whole piece of land, but only the part lying above the tunnel, the cottage, and the piece of land lying between the cottage and the road; and also, if the owner required it, the severed portion, which was less than half an acre.

THE Plaintiff was the owner in fee simple upon certain trusts of a piece of land of 2A. 2R. 20P. in extent, situate within the municipal boundary of the city of *Bath*, in the immediate neighbourhood of dwelling-houses, but not completely surrounded by them. The land was comprised within a ring fence, and had been for many years used as a market-garden, and was still so used. About twenty-five years ago a cottage was erected thereon, for the purpose of being occupied by the tenant of the garden in connection therewith. This cottage consisted of three rooms, nine feet in height, with two large cellars suitable for storing vegetables and fruits. It was built within a few feet of the *Bath* and *Wells Road*, on which the land abutted. In front of it were some ornamental flower-beds, which, however, did not occupy the whole space between it and the road. The land and cottage were in the occupation of a market-gardener as tenant from year to year. The neighbouring houses were gentlemen's residences, having gardens very much less in extent than the piece of land in question. The *Somerset and Dorset Railway Company* in making their line drove through this piece of land a tunnel which passed under one corner of the cottage, and divided the land into two portions, one of which was less than half an acre. The company in the first instance served notice of their intention to take so much of the land as formed the site of the tunnel; but they afterwards claimed to be entitled to take simply an easement or right of tunnelling under the land. The Plaintiff insisted that they were bound to purchase part, if not the whole, of the piece of land, and this suit was instituted for the purpose of having it determined how much the company were bound to take.

One question in the cause was whether the land was situate in a town or built upon within the meaning of the 93rd section of the *Lands Clauses Consolidation Act*, 1845. The Court held that it was not.

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Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

It is quite clear that the Defendants must take the cottage, of which they take part. They must also take the site of the tunnel, and not merely an easement: *Ramsden* v. *Manchester and Altrincham Railway Company* (1); *Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2); and even if this were not so, the company would be precluded by their notice to treat from taking an easement simply. We further say that the whole piece of land is appurtenant to the cottage, which the company must take; and therefore they must take the whole under sect. 92 of the *Lands Clauses Consolidation Act: Grosvenor* v. *Hampstead Junction Railway Company* (3); *Salter* v. *Metropolitan District Railway Company* (4). At all events they must take the severed portion, which is less than half an acre.

The decree ought to be prefaced by a declaration as to the amount of land to be taken, and then to follow the form of the decree in *Marson* v. *London, Chatham, and Dover Railway Company* (5).

Mr. *Langley* (Mr. *Fry*, Q.C., with him), for the company:—

It is absurd to speak of this large piece of land as appurtenant to a small cottage of this description. The test is, would the land pass under a devise of the cottage? Plainly it would not. In fact the cottage is appurtenant to the land, and not the land to the cottage. The cottage was erected and is occupied with a view to the more beneficial occupation of the land as a market-garden. Suppose (what might well have happened) that the owner, with the like view, had thought fit to build another cottage of equal size on another part of the land, would this land have been appurtenant to both cottages? or if not, how could it be appurtenant to either? Another mode of shewing the same thing is to compare the cottage with the neighbouring houses, which are much larger, but have very much smaller gardens. The distinction between this and *Salter* v. *Metropolitan Railway Company* is, that here the whole property is devoted to purposes of trade:

(1) 1 Ex. 723.
(2) 2 D. M. & G. 94.
(3) 1 De G. & J. 446.
(4) Law Rep. 9 Eq. 432.
(5) Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546.

there it was not. We are only bound to take the site of the tunnel, the cottage, and a way to it.

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Mr. *Southgate*, in reply.

LORD SELBORNE, L.C.:—

The main question in this case appears to be, whether this piece of land is a field or a garden: and, as between the two, I am of opinion that it is a field and not a garden. I think, therefore, the company are only bound to take the cottage, the piece of land between it and the road, and the land situate immediately above the tunnel, and also, if the Plaintiff requires it, the severed portion of the land, which is less than half an acre.

Mr. *Southgate*:—The Plaintiff does require that severed portion to be taken.

LORD SELBORNE:—Then the decree will contain a statement that the Plaintiff so requires. It will be prefaced by a declaration to the effect which I have just mentioned, and then will follow the form given in the case of *Marson* v. *London, Chatham, and Dover Railway Company* (1), to which I have been referred.

Solicitors: Messrs. *Pilgrim & Phillips*, agents for Messrs. *Inman & Inman, Bath*; Mr. *W. Toogood*.

FREKE *v.* LORD CARBERY.

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1873
July 3.

[1872 F. 46.]

Will—Trust for Accumulation—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98)*—Bequest of Leasehold—Foreign Domicil—Lex loci rei sitæ.*

The validity of a testamentary disposition of an English leasehold is governed by the law of *England*, and not by the law of the testator's domicil.

Where, therefore, a testator domiciled in *Ireland* by his will gave an English leasehold to trustees upon trusts for sale and investment, and directed the investments to be held upon such trusts as were thereby declared concerning his general personal estate, and the trusts declared of the general

(1) Law Rep. 6 Eq. 101; Ibid. 7 Eq. 546.

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FREKE v. LORD CARBERY.

personal estate included trusts for accumulation extending beyond any of the periods allowed by the *Thellusson Act* (which does not apply to *Ireland*):—

Held, that although the validity of the trusts of the general personal estate was not questioned, still the *Thellusson Act* applied to the English leasehold and the proceeds of the sale thereof, and that the trust for accumulation of the investments of the proceeds of sale in excess of the periods permitted by that Act was invalid.

The meaning of the rule, "*Mobilia sequuntur personam*," discussed.

THIS was a suit instituted by the trustees of the will, dated the 26th of April, 1845, of the late *John* Lord *Carbery*, for the purpose of obtaining the opinion of the Court on certain questions which had arisen in administering the trust. The only one of these questions which it is considered necessary to report arose under the following circumstances:—

The testator was a domiciled Irishman, and died on the 12th of May, 1845. At the time of his death he was entitled to Government stocks and funds and other pure personal estate of considerable value, and also to a leasehold house in *Belgrave Square*. By his will he gave the principal of all his property in the Governments stocks or funds and all other his personal property in any manner secured or invested so as to be productive and bearing interest, whether in *England* or *Ireland* or elsewhere, to trustees upon certain trusts, including trusts for accumulation of the income to arise therefrom, extending beyond any of the periods allowed by the *Thellusson Act*. The testator also by his will gave his leasehold house in *Belgrave Square* to the same trustees upon trust to sell the same as therein mentioned, and to apply the proceeds in discharge of any incumbrances which at the time of the testator's death might affect the said house, and after payment thereof to invest the residue of the said moneys in Government or real securities, and hold the same upon such trusts as were thereinbefore declared concerning the principal of the testator's Government stocks, funds, or other personal estate.

The *Thellusson Act* does not apply to *Ireland*, and the validity of the trusts for accumulation was not disputed so far as these related to the testator's Government stocks and funds and other pure personalty; but the question was raised whether these trusts were valid as to the proceeds of the sale of the house in *Belgrave Square*.

Mr. *Pearson*, Q.C., and Mr. *Kekewich*, for the trustees, stated the questions to the Court.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Hall*, and Mr. *Southgate*, Q.C., and Mr. *J. W. Chitty*, for next of kin of the testator:—

We submit that the validity of a testamentary disposition of a leasehold estate is governed by the *lex loci rei sitæ*. A leasehold for years is immoveable property, and the devolution of such property is governed by the *lex loci*. This is the general principle, and there is no authority to the contrary. The opinion of Mr. *Jarman* was in accordance with our contention; he says (1): "Leaseholds for years, . . . though they are with us transmissible as personal estate, are governed by the *lex loci*, and do not follow the person; so that, if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law." It is true that the editors of that work add the following expression of opinion: "This conclusion, however, has not been acquiesced in by later text writers or annotators. It is said in Jarm. Byth. Conv. (2), that the *lex loci* must determine what part is real and what part personal; and that then the *lex domicilii* comes in and determines the distribution of that part of the property which the *lex loci* has determined to be personal: *Deane* on the Law of Wills (3), citing *Price* v. *Dewshurst* (4); Hayes & Jarm. Conc. Forms of Wills (5). The case of *Jerningham* v. *Herbert* (6) is in point on the same side; as also is a *dictum* of Sir *J. Stuart* in *Pearmain* v. *Twiss* (7). A similar expression of opinion is to be found in *Davidson's* Conveyancing (8); but the authorities cited really have nothing to do with the matter. If, then, the trusts for accumulation would be invalid if declared respecting the house, they must be equally invalid if declared respecting the proceeds of sale; a testator cannot escape from an Act of Parliament simply by creating a trust for sale. Thus a devise of land in *England* upon trust for

(1) Jarm. on Wills, 3rd Ed. vol. i. p. 4, n. (*k*).
(2) Vol. xi. 3rd Ed. by Sweet, p. 15.
(3) Page 15.
(4) 4 My. & Cr. 81.
(5) Page 2, 4th Ed.; p. 25, 5th Ed.
(6) 4 Russ. 388.
(7) 2 Giff. 136.
(8) 3rd Ed. vol. iv. p. 264.

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sale, coupled with a direction that the proceeds are to be laid out for charitable purposes in *Scotland* is bad, although the *Mortmain Act* does not extend to *Scotland*: *Curtis* v. *Hutton* (1).

Mr. *Fry*, Q.C., and Mr. *Hornell*, for parties interested under the trusts for accumulation:—

It must be admitted that there is no express authority on this point. In addition to the cases mentioned in the note by the editors of *Jarman* on Wills, reference may be made to *Wallace* v. *Attorney-General* (2).

When it is said, "*mobilia sequuntur personam*," the term "*mobilia*" must be understood as meaning personal property. The English law knows nothing of moveable and immoveable property except as designations of personal and real estate. That this is so clearly appears from the following passage in the judgment delivered by Lord *Loughborough* in *Sill* v. *Worswick* (3), cited with approbation in *Story's* Conflict of Laws (4): "It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

All that the *lex loci rei sitæ* has to do in a case such as the present is, to determine whether or not the testator's interest is to be deemed moveable or immoveable. "Not only lands and houses, but servitudes and easements and other charges on lands, as mortgages and rents, and trust estates are deemed to be, in the sense of the law, immoveables, and governed by the *lex rei sitæ*. But in addition to these, which may be deemed universally to partake of the nature of immoveables, or (as the common law phrase is)

(1) 14 Ves. 537.
(2) Law Rep. 1 Ch. 1.
(3) 1 H. Bl. 665, 690.
(4) Sect. 380, 2nd Ed.

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to savour of the realty, all other things, though moveable in their nature, which by the local law are deemed immoveables, are, in like manner, governed by the local law. For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory may impress upon it any character which it shall choose; and no other nation can impugn or vary that character. So that the question in all these cases is not so much what are or ought to be deemed *ex suâ naturâ*, moveables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immoveable or real property, or not, we must resort to the *lex loci rei*": *Story's* Conflict of Laws (1). Again, *Foelix*, in his *Traité du Droit International Privé* (2) lays down the law in the following terms: "*La loi de la situation de l'immeuble décide si un objet corporel ou un droit incorporel attaché à un immeuble est lui-même meuble ou immeuble sans egard à la personne du propriétaire ou créancier.*" A leasehold interest is "*un droit incorporel*" within the meaning of this passage.

We say, then, that the English law alone can decide as to whether the interest in question is moveable or immoveable; that that law decides it to be moveable; that, consequently, the rule *mobilia sequuntur personam* applies, and the validity of the disposition must be determined by the law of the testator's domicil, that is, in this case, by the law of *Ireland*. The *Thellusson Act* does not apply to *Ireland;* and therefore the trusts for accumulation of the proceeds of sale of the leasehold are equally valid with the trusts of the general personal estate.

Mr. *Armstrong*, for other parties.

LORD SELBORNE, L.C., after disposing of the other questions, continued:—

The only remaining question which has been argued is as to the leasehold estate. Now I confess that is a point upon which

(1) Sect. 447, 2nd Ed. (2) Liv. I. Tit. II. pl. 36.

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I need no authority. The territory and soil of *England*, by the law of nature and of nations, which is recognised also as part of the law of *England*, is governed by all statutes which are in force in *England*. This leasehold property in *Belgrave Square* is part of the territory and soil of *England*, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so. An Act of Parliament, limiting the period for which accumulations are permitted, has as much force in *Belgrave Square*, and upon every part of the property in the land of *Belgrave Square*, as it has in any other part of *England:* and, for that purpose, it appears to me to be totally immaterial what is the quantity of interest dealt with by the will. All the general doctrines and maxims which are to be found in any of the books of authority really go the same way. The passage which Mr. *Fry* quoted from *Story*, in which the words of Lord *Loughborough* were cited with approbation, is simply a translation into the phraseology of the English law of the maxim of the general law, *mobilia sequuntur personam*, and is certainly not meant to apply arbitrarily in a new sense, because Lord *Loughborough* used the word "personal" instead of "moveable." The doctrine depends upon a principle which is expressed in the Latin words; and that is the only principle of the whole of our law as to domicil when applicable to the succession of what we call personal estate. It is so, not by any special law of *England*, but by the deference which, for the sake of international comity, the law of *England* pays to the law of the civilised world generally. Domicil is allowed in this country to have the same influence as in other countries in determining the succession of moveable estate; but the maxim of the law of the civilised world is *mobilia sequuntur personam*, and is founded on the nature of things. When "*mobilia*" are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable and not moveable. The doctrine is inapplicable to it; and *Story*, in that very passage cited by Mr. *Fry* from placitum 447, manifestly recognises that, where he says that all lands and all houses are necessarily im-

moveable; and then he speaks of their universally partaking of the law of immoveable property, or "property savouring of the realty,"—language which must be used with respect to an interest less than fee simple, and less than what we call freehold; because to speak of a thing "partaking" or "savouring" implies that, by the positive law of the country, they also are made to partake and savour in some respects of a law not applicable to all kinds of immoveable property. I think, therefore, that the doctrine, which appears to me to be clearly the true doctrine, is recognised by necessary implication in those passages to which reference has been made; and *Story* says, with regard to some things, such as fixtures, which may or may not be moveable or immoveable, which are ambiguous in their nature, if they are at all connected with immoveable property, then it belongs to the law of the country in which that property is situated to determine whether they shall be deemed moveable or immoveable. The attempt to infer, that things immoveable in their nature are to be considered moveable constructively, because the beneficial interest is allowed to go like the beneficial interest in and succession to moveables, appears to me to be quite turning away *Story's* doctrine from its real substance, which is this, that so strong is the force of the immoveable character where it is found, that it will attract to itself *primâ facie* things which are ambiguous, at least to the extent of obliging other nations to recognise the law of the place where the immoveable property is situate, as entitled to lay down the rule with regard to those ambiguous things connected with it.

I hold, therefore, that as to the proceeds of the house in *Belgrave Square*, they must necessarily follow the law applicable to the house itself, and are in no degree brought under a different law by the direction in the will; and that as to the house and the proceeds of the house the *Thellusson Act* does apply.

Solicitors: Mr. *H. H. Walford*; Messrs. *Cope, Rose, & Pearson*; Messrs. *Dawes & Son.*

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In re BLYTH'S TRUSTS.

Railway Company—Lands Clauses Act, s. 80—*Purchase-Money in Court—Re-investment on Mortgage—Costs.*

Where purchase-money had been paid into Court under the *Lands Clauses Act* and invested in Consols, upon an application for its re-investment on mortgage security:—

Held, that such re-investment could not be treated as a permanent investment under sect. 80 of the Act; and that the company must pay the costs without any condition as to the costs of any future permanent investment.

THIS was a Petition by the trustees of a will for the sanction of the Court to the investment on mortgage security of purchase-money paid into Court by the *Midland Railway Company*, under the *Lands Clauses Act*, in respect of property subject to the trusts of the will taken by the company under their compulsory powers.

Under a previous order of the Court the money had been invested in Consols, and the trustees who had entered into a provisional agreement for investing the fund on mortgage security at 4½ per cent. now prayed that the agreement might be sanctioned by the Court, the stock sold out, and the proceeds re-invested as proposed.

The only question was whether, and under what conditions, the company was liable, under sect. 80 of the *Lands Clauses Act*, to pay the costs of the application and of the re-investment.

Mr. *F. Webb*, for the Petitioners.

Mr. *Sargant*, for the railway company:—

The Court can only order the company to pay the costs of one interim investment under sects. 70 and 80 of the *Lands Clauses Act*. The company has already paid the costs of the investment of the money in Consols, and if it is to pay the costs of the proposed re-investment, it can only be on condition that this is to be treated as a permanent investment, and that the company

is not to be liable to the costs of any future investment: *In re Lomax* (1).

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LORD SELBORNE, L.C., said that he could not treat this as a permanent investment. The Court had power under sects. 70 and 80 of the *Lands Clauses Act* to order the company to pay the costs of more than one interim investment; and in this case the company must pay the costs of the application and of the proposed investment without any condition as to the costs of any future permanent investment.

Solicitors: Messrs. *Swann & Co.*; Messrs. *Beale, Marigold, & Beale.*

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Solicitor and Client—Bills of Costs—Series of Bills treated as one—Taxation after Twelve Months.

A solicitor having delivered successive bills of costs relating to the same suit and on the same retainer, and having received from his client payments on account, though not in discharge of any one bill, sent a signed letter to the client, stating that he should increase some of his former charges, and containing a list of additions to certain items in his previous bills:—

Held, that, under the circumstances of the case, the letter, being a correction of the earlier bills, must be treated as bringing them down as one entire bill to that date, and that taxation of the whole must be directed, though most of them had been delivered more than twelve months before the application.

Quære, whether, as a general rule, when a succession of signed bills has been delivered to a client relating to a particular business, the relationship of solicitor and client being continued throughout, each bill is to be regarded as an addition to the others, so as to bring the whole series as one single bill down to the date of the latest delivery.

THIS was an application, which came before the Court on an adjourned summons, on behalf of *Joseph Turner*, for the taxation of the bills of costs of his solicitor, *J. P. Cartwright.*

The bills related to certain transactions with reference to the dissolution of a partnership and to a suit for that purpose, in whic the applicant was Plaintiff, lasting from 1868 to 1872.

(1) 34 Beav. 294.

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The following were the amounts and dates of delivery of the bills in question :—

£	s.	d.		
397	5	11	delivered	6 March, 1871.
13	5	11	„	9 Sept. 1871.
256	11	7	„	„ „
4	18	0	„	„ „
22	17	5	„	„ „
70	3	3	„	29 Feb. 1872.
19	9	0	„	16 Nov. 1872.

On the 9th of March, 1871, *Turner* gave to *Cartwright* his acceptance for the sum of £300 on account of the first bill; with which sum, together with two small further payments, he was credited in the statement of account sent with the four next bills on the 9th of September, 1871. On the 6th of October, 1871, *Turner* gave two acceptances for £150 each, and on the 29th of February, 1872, the sixth bill of costs was delivered.

On the 4th of September, 1872, *Cartwright* addressed a letter to *Turner*, with a statement of account, in which he was credited with his payments and acceptances as cash.

On the 9th of September, 1872, the relationship of solicitor and client still continuing between them, *Cartwright's* clerk applied to *Turner* for payment of the balance then due, when *Turner* made certain complaints of overcharges in the accounts, which led to a correspondence and personal interviews on the subject.

It appeared from the evidence that during these communications *Cartwright* had suggested that the bills should be taxed.

Another cash statement was delivered shewing a balance claimed to be due from *Turner* of £114 2*s.* 11*d.*, after he had been credited with all payments made on account.

On the 6th of November, 1872, *Cartwright* wrote and delivered to *Turner* the following signed letter:—

"In the charges made to you the amounts charged for my journeys are, I find, exceedingly below what I am entitled to, and I shall ask to increase them by the following amounts:—

	£	s.	d.
" Charges, Feb. 1870, 13th—17th, one day short, viz. 18th—Increase of charge . . .	4	3	6
" Feb. 23 to 25—Increase of charge for sustenance and railway expenses	2	5	6
" March 9 to 11—The like increase . . .	1	15	6
The like, half day	1	11	6
" March 16 to 18—The like increase . .	2	5	6
The like, half day	1	11	6
" Feb. 3, 1871; 4th, 5th, and 6th—Increase of two days and expenses	5	16	0
" Making a total addition to my account . .	£19	9	0"

On the 11th of November, 1872, a summons was taken out for the taxation of the seven bills, which, as regarded the first five, was resisted by ~~Turner~~ Cartwright, on the ground that they were delivered more than twelve months before the date of the summons, and were therefore not taxable under 6 & 7 Vict. c. 73, s. 37.

Mr. *Fry*, Q.C., and Mr. *Yate Lee*, in support of the application:—

We contend that in this case the client is entitled to have all the bills taxed, although five of them were delivered more than a year before the summons was taken out.

In the case of *In re Nicholson* (1), where a number of bills of costs had been delivered extending over several years, and sums had been received on account, but none of the accounts had been settled, on a petition for taxation a year after the delivery of most of the bills, shewing considerable items of overcharge, it was held that taxation of all the bills should be directed.

In *Stokes* v. *Trumper* (2), where a solicitor had been retained for and had undertaken a particular business, his bills of costs for carrying it through to its completion were treated as one bill, and in *Whitehead* v. *Lord* (3) it was laid down as a general rule that where an attorney or solicitor has been retained to conduct a particular suit, he cannot sue for his bills of costs till the whole

(1) 3 D. F. & J. 93. (2) 2 K. & J. 232.
(3) 7 Ex. 691.

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business is concluded. Applying the principles of these authorities to the present case, we contend that, as the retainer continued throughout in relation to the same business and in the same suit, each of the successive bills sent in by *Cartwright* must be taken, not as a separate bill, but as an addition to the others, so that the whole series is brought down as one bill to the date of the one last delivered.

We submit that in this case there are "special circumstances" within the exception of sect. 37 of the Act 6 & 7 Vict. c. 73, so that taxation may be directed even after the expiration of twelve months, as in the case of *In re Street* (1), where Lord *Romilly* held that the client was entitled to have his solicitor's bills taxed more than a year after the signature of an account and the retainer of the costs by the solicitor. A similar order was made in the case of *In re F*—— (2), more than twelve months after the delivery of a bill of costs, on the ground of the subsequent continuance of the relation of solicitor and client.

There are, as we submit, in these bills several distinct items of overcharge, which are "special circumstances" within the meaning of the Act; and as the effect of the letter of the 6th of November, 1872, which was a correction of the previous bills, was to bring down the whole series of bills to that date, Mr. *Turner* is entitled to an order for taxation as to all the bills.

Mr. *Southgate*, Q.C., and Mr. *Ince*, for Mr. *Cartwright*:—

The continuance of the relation of solicitor and client is not in itself sufficient to entitle the client to an order for taxation; that is merely one circumstance to be taken into consideration.

To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery there must be either pressure or gross overcharge amounting to what the Court designates as fraud: *In re Strother* (3); *In re Browne* (4); *Re Harle* (5). Here there is no allegation of pressure; and though we admit some slight errors in the bills, yet there is no ground for the allegation of any gross overcharge, and the

(1) Law Rep. 10 Eq. 165.
(2) 16 W. R. 749.
(3) 3 K. & J. 518.
(4) 1 D. M. & G. 322.
(5) 19 L. T. (N.S.) 305.

applicant has failed to shew "special circumstances" which can bring the case within the exception of sect. 37 of the Act.

In the case of *In re Barnard* (1) it was held, that where special circumstances are relied upon as a ground for taxation after the prescribed time, they must be such as the client could not reasonably have availed himself of sooner; and it would appear that in that case the Court inclined to the view that mere overcharge was not a "special circumstance" within the meaning of the Act.

It has been contended that the whole of the series of bills must be taken as one bill, and be brought down to the date of the letter of the 6th of November, 1872; but we submit that this is not the case. The bills are distinct, and the letter in question is not strictly a bill at all; at any rate, it cannot render taxable the five bills delivered more than twelve months before the summons was taken out.

LORD SELBORNE, L.C.:—

I am of opinion that all these bills must go for taxation. So far as the alleged overcharges are concerned, they are of a very slight description, and there is not the least trace of the element of fraud or impropriety in any one of them. It appears to me to be clear that these bills have been, in point of fact, brought down as one united series of bills, not separated from each other, almost to the date of the application for taxation.

In the first place there is this circumstance—not, perhaps, a decisive one—that there was one account current kept and never settled, in which all these bills of costs were from time to time entered, and in which there were also entered on the other side various payments made on account, but which cannot be represented as being payment of the bills in question, or any one of them. It is also a circumstance to be remembered (though far from decisive and perhaps not in itself very important), that the relation of solicitor and client continued throughout.

In that state of things a bill was delivered in February, 1872, the last of the series down to that time, and communications took place, personally and by letter, between the solicitor and the client,

(1) 2 D. M. & G. 359.

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who was not in all respects satisfied with the charges. It is sworn, and not contradicted, that the solicitor himself invited taxation, not limiting that suggestion to bills which had been delivered within twelve months. It is also sworn, and not contradicted, that the client said he thought it would be the best course to act on that suggestion, and to tax the bills. Again, there being no hint of any separation of the bills with reference to the date of their delivery, the solicitor, on the eve of an application for taxation, on the 6th of November, 1872, took the opportunity, which, in my judgment, was open to him, to correct, by way of addition, the old bills, which had been delivered more than a year before; and he, by a signed document answering every legal purpose of a signed bill of costs, stated that he should seek to increase several of the sums charged in the previous bills for journeys, which he considered to be below the proper amount, by the sums therein mentioned. Then he gave the details of the increased charges, with the dates, beginning with February, 1870, and ending with February, 1871, in a column of figures applicable to each proposed increase, concluding with these words, "making a total addition of £19 9*s.* to my account." This he signed without any qualification.

In my judgment that was equivalent to a correction, with these additions at that date, of the bills previously delivered; and if, in the ordinary case of the delivery from time to time of a series of bills with respect to the same business while the relation of solicitor and client is continuing without any settlement or payment, they are not to be taken as a single bill, then, in my judgment, these facts clearly give that character to this series of bills.

9 Ch. D. 541
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It is not, therefore, necessary for me to say anything about the rather important question, which was raised in a more general form by the arguments of Mr. *Fry* and Mr. *Yate Lee*, namely, that upon the principle of the cases of *Stokes* v. *Trumper* (1), and *Whitehead* v. *Lord* (2), neither of which was a case of taxation, and of *In re Street* (3), which was a case of taxation, it is a correct view to hold, that, where the relation of solicitor and client has been continued, and the business of a particular retainer continues in a particular suit with reference to the same matter, if a client has a succession

(1) 2 K. & J. 232. (2) 7 Ex. 691.
(3) Law Rep. 10 Eq. 165.

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of signed bills sent in to him, each bill so sent in is to be regarded as an addition to the others, and as bringing the first bill down to the date of the latter, so that in the end the whole are to be treated as one single bill down to the date of the latest delivery. The argument was that these cases and their principle justify that general conclusion, which has not been disproved by any actual authority cited on the other side. That seems to me an important question, though not requiring decision in the present case. My own impression would be, that if all the cases could be looked at, which have been very numerous both before Lord *Langdale* and the present Master of the Rolls, it might be found difficult to reconcile that proposition with some of those cases. But those cases have not been cited to me, and I think that question should be reserved for future consideration, if it should ever require to be determined.

Upon the circumstances of this particular case, and for the reasons I have stated, I entertain no doubt that all the bills have been brought down to the date of the 6th of November, 1872. There will be no costs of the adjournment into Court.

Solicitors: Messrs. *Chinery & Aldridge;* Messrs. *Doyle & Edwards,* agents for Mr. *J. P. Cartwright, Chester.*

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L. C. for M. R. 1873 July 23.

[1872 B. 363.]

Will—Words, "Any money of which I may die possessed"—Money at Bankers—Apportioned part of Annuity or Interest—Unpaid Legacy.

A testamentary gift by a testatrix of "any money of which I may die possessed":—

Held, to include cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal.

15 Ch D 666, 672 6 P D 203 25 Ch D 155 157

THIS was a suit for the administration of the estate of *Elizabeth Ainsworth,* and the question which came before the Court, on

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further consideration, was as to the construction of a testamentary paper, dated the 13th of January, 1863, which was as follows:—

"If unhappily I should survive my dear husband, I give and bequeath any money of which I may die possessed to my dear sister *Harriet Brandreth* for her life, and after her death to her children in equal proportions."

Peter Ainsworth, the husband of *Elizabeth Ainsworth*, predeceased her, and after his death she executed a second testamentary paper, which was signed and attested but not dated, and thereby gave two pecuniary legacies and various specific bequests. By a third testamentary paper, dated Good Friday, April, 1870, she gave other pecuniary legacies and specific bequests, and desired all her furniture and everything in her garden to be sold.

Elizabeth Ainsworth died on the 16th of April, 1870, and the said three testamentary papers were admitted to probate as her last will, and administration with the will annexed of her personal estate was granted to the Plaintiff.

Peter Ainsworth by his will bequeathed to his wife a legacy of £1000 and the furniture at his dwelling-house.

The legacy was not paid at the time of her death, or acknowledged by the husband's executors as at her disposal.

The testatrix was at the time of her death possessed of a small sum of cash in the house, and there was a sum standing to her credit at her bankers. She was also entitled to an annuity under her marriage settlement payable at stated times, and to a small sum for interest due from her bankers on the balance of her account.

The question as between the Plaintiff, the administratrix, and Mrs. *Brandreth* and her children, who claimed under the gift, was, whether the words, "money of which I may die possessed," comprised the said unpaid legacy; also, whether they included any money not actually in the possession of the testatrix but to which she was entitled, such as the apportioned part of her annuity from the last stated day of payment, and the interest on the balance at the bankers that accrued since the last time she was credited with it.

Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

The words, "any money of which I may die possessed," in the testamentary paper, which must be taken as part of the will of the testatrix, cannot be taken to include the legacy to which she was entitled under her husband's will, nor any other money not actually reduced into possession at the time of her death. The word "money" has a restricted meaning. Thus, in *Lowe* v. *Thomas* (1), under a gift of "my money," it was held that stock did not pass. In *Dowson* v. *Gaskoin* (2), a gift of "whatever remains of money" was held to refer to the general residuary estate of the testator.

Mr. *Rigby*, for Mrs. *Brandreth* and her family:—

The words in question are capable of a wider construction than that which has been contended for: thus in *Parker* v. *Marchant* (3) a testator's balance at his bankers was held to pass under the words "ready money," and in *Manning* v. *Purcell* (4) under the words "all my moneys."

In *Petty* v. *Willson* (5), under a bequest by a testator of "any money that he might die possessed of, or which might be due and owing to him at the time of his decease," the money receivable under a policy on his life was held to pass.

In *Collins* v. *Collins* (6), under a bequest of "moneys both in the house and out of it," although Vice-Chancellor *Bacon* considered that shares in a building society and stock would not pass, yet it was admitted that money at the bankers and the savings bank, and arrears of a superannuation allowance due to a testator, were included in the words.

In *Prichard* v. *Prichard* (7), where a testator directed the income arising from his principal money to be paid to his wife for life, and after her death to be divided among his children, he having but little actual money, Vice-Chancellor *Malins* held that the whole of his personal estate passed, including leaseholds.

In *Langdale* v. *Whitfeld* (8) a bequest of money was held to

(1) 5 D. M. & G. 315. 18 Jun 563.
(2) 2 Keen, 14.
(3) 1 Y. & C. Ch. 290; 1 Ph. 356.
(4) 7 D. M. & G. 55.
(5) Law Rep. 4 Ch. 574.
(6) Ibid. 12 Eq. 455.
(7) Ibid. 11 Eq. 232.
(8) 4 K. & J. 426. 4 Jur NS 756

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include all money due to a testator, whether upon security or otherwise.

Upon the authority of these cases I submit that the words in this testamentary gift, "any money of which I may die possessed," include the legacy from the husband, and also the apportioned share of the annuity which accrued *de die in diem*, and the small sum due to the testatrix for interest.

LORD SELBORNE, L.C.:—

This case has been argued very well, and I wish very much that I could accede to the argument of Mr. *Rigby*, because I cannot resist the impression that probably that which this testatrix intended is what he suggests.

If the authorities had not required that the word "money" should be strictly construed, I am by no means certain that it would not be more in accordance with the ordinary and popular use of the word to hold it, when used in this way in a testamentary instrument, to be significant of all that we call personal or moveable property, which, as a general rule, unless there be particular directions to the contrary, is subject to conversion after death. But though this is one of the instances in which the necessity of adhering to strict principles of construction renders it doubtful whether those principles may not more frequently contradict than give effect to the intention, yet, looking to the principle by which I am bound, I am compelled to hold that the word "money" cannot be extended to such an interest as the legacy in question.

The case, in its particular circumstances, is singular. [His Lordship then stated the purport of the testamentary papers which were to be construed as a single instrument.]

The argument which would extend the words "money of which I may die possessed" to a claim upon the executors of her husband for a pecuniary legacy, neither reduced into possession by payment nor by any acknowledgment of the executors that they held it at her disposal, would go the length of giving to *Harriet Brandreth*, and her children afterwards, everything from which the other pecuniary legatees could be paid, unless it should happen that the proceeds of furniture not specifically bequeathed was

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sufficient for the purpose. I cannot think that I am at liberty to extend the original strict and natural meaning of the words "any money of which I may die possessed" under such a testamentary instrument, and with such consequences.

I fear, therefore—and it seems to me to be consistent with all the authorities that have been cited—that I must hold that the gift to *Harriet Brandreth* and her children applies only to cash in the house and to money at the bankers, or any other money which lay in such a situation that it was her ready money at call at the time of her death.

With respect to the annuity under her marriage settlement, I do not think, according to the principle of my interpretation, that she could be considered to be possessed, at the time of her death, of any apportioned part from the last-stated day of payment to the time of her death; but if any part of the annuity was then in arrear, and there was nothing to prevent her having it immediately on application, I apprehend that it would pass.

I do not think that the legatees can claim the apportioned part of the interest on the balance at the bankers, which was payable half-yearly. These are nice distinctions, but according to the authorities I am obliged to draw them.

Solicitors: Messrs. *Williams & James;* Messrs. *Cole, Cole, & Jackson.*

In re BUTLER'S WILL.

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1873
July 25.

Practice—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 69—*Fund in Court—Payment out to Tenant in Tail—Disentailing Deed.*

A fund in Court representing land taken by a railway company under their compulsory powers will not be paid out to a tenant in tail without a disentailing deed having been executed.

Re South Eastern Railway Company (1) and *Notley* v. *Palmer* (2) held not applicable.

THIS was a Petition by *John Butler Bowdon* and *Eardswick John Butler Bowdon,* his eldest son, for sale and payment to them of a

(1) 30 Beav. 215. (2) Law Rep. 1 Eq. 241.

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sum of £1157 7*s.* 5*d.* Bank Annuities in Court, being the investment of the purchase-money of certain lands taken by the *Blackburn and Preston Railway Company* for the purposes of their undertaking. The lands in question were devised by the will of *Mary Butler*, dated the 20th of January, 1840, to the Petitioner *John Butler Bowdon* for life, with remainder to his first and other sons in tail male. The lands were taken by the company under the compulsory powers. The purchase-money was ascertained by two surveyors named by the company and the tenant for life respectively, and was paid into Court under the provisions of the *Lands Clauses Consolidation Act*, 1845. The Petitioner *Eardswick John Butler Bowdon* had attained twenty-one, but no disentailing deed had been executed.

Mr. *Humber*, for the Petitioner, referred to *Re South Eastern Railway Company* (1) and *Notley* v. *Palmer* (2), as cases in which a fund had been paid out under similar circumstances without a disentailing deed being executed.

Mr. *Ince*, for the railway company.

LORD SELBORNE, L.C., declined to follow the cases referred to, in a case such as the present, where the fund represented land taken by a railway company under their compulsory powers, and made the order for payment conditionally upon the production to the Registrar of a properly executed disentailing deed.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Clarke, Woodcock, & Ryland.*

(1) 30 Beav. 215. (2) Law Rep. 1 Eq. 241.

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[1871 B. 210.]

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July 24; *Aug.* 1.

Legacy to Married Woman—Reversionary Interest—Assignment—Husband's Debt—Executor's Right of Retainer—20 & 21 *Vict. c.* 57.

A married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to *L.* for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57. On the reversion falling in, the executors of the testator claimed to be entitled to retain the amount of the debt out of the legacy:—

Held, that there was no right of retainer, and that *L.* must be paid in full.

THOMAS BATCHELOR, by his will, bequeathed a sum of £1000, after the death of his wife, upon trust for his daughter *Helen*, the wife of *Lindsay Sloper*, for her life for her separate use, and after her death for her children.

By a codicil to his will, dated the 10th of October, 1867, the testator revoked the said legacy of £1000, and bequeathed to his said daughter absolutely a legacy of £350, payable after the death of his wife.

The testator died in 1868, leaving his wife surviving. At the time of the testator's death *Lindsay Sloper* was indebted to him in the sum of £325 15*s.* for principal and interest upon two promissory notes.

By an assignment, dated the 22nd of August, 1870, Mrs. *Sloper* and her husband assigned to *F. Lucas*, for valuable consideration, the said legacy of £350. This deed was duly acknowledged by the Plaintiff under the provisions of 20 & 21 Vict. c. 57, and notice of the assignment was, on the 30th of August, 1872, served on the trustee of the testator's will.

On the 19th of May, 1871, the testator's widow died.

The suit was instituted by the Plaintiff, Mrs. *Sloper*, by summons in Chambers, for the administration of the testator's estate, and the question arose, on further consideration, whether the executors were

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entitled to retain, out of the legacy to the Plaintiff of £350, the amount of her husband's debt to the testator's estate.

Mr. *Fry*, Q.C., and Mr. *Locock Webb*, for the Plaintiff.

Mr. *Fischer*, Q.C., and Mr. *J. C. Wood*, for *Lucas*, the assignee, contended that the executors had no right of set-off or retainer in respect of the husband's debt as against the right of an assignee for value of the wife's reversionary interest in the legacy: *Carr* v. *Taylor* (1). Under *Sir R. Malins' Act* (20 & 21 Vict. c. 57) the wife had an absolute power of disposition over her reversionary interests, whether in her own right or in that of her husband, and such an assignment was quite unaffected by the husband's debt to the testator's estate.

Mr. *Southgate*, Q.C., and Mr. *Speed*, for the executors:—

The executors in this case have a right of retainer. By the words of the Act a married woman can dispose "of any future or reversionary interest of such married woman, or her husband in her right, in any personal estate to which she shall be entitled." Here Mr. *Sloper*, at the time of the assignment, was indebted to the testator; therefore the *quantum* of his interest in the legacy which was assigned to *Lucas* must be taken to have been reduced by the amount of his debt; and consequently the claim of the executors to retain the amount of the debt must take priority over that of the assignee.

Mr. *Solomon*, for *Lindsay Sloper*.

Aug. 1. LORD SELBORNE, L.C.:—

The question on which I reserved my judgment was, whether the executors of the testator are entitled to retain out of a legacy of £350, given by a codicil to the Plaintiff, Mrs. *Sloper*, a sum of £325 15*s.* due from Mrs. *Sloper's* husband to the testator's estate, in priority to the right of Mr. *Lucas*, her assignee for value of the legacy. By the codicil this legacy was made payable to Mrs.

(1) 10 Ves. 574.

Sloper (not for her separate use, though another legacy of larger amount was given to her by the will for her separate use) after the death of the testator's widow, who died on the 19th of May, 1871. It was, therefore, reversionary when the assignment to Mr. *Lucas*, dated the 22nd of August, 1870, was made. That assignment was duly executed by Mrs. *Sloper*, with the concurrence of her husband, under the provisions of the statute 20 & 21 Vict. c. 57; and it is not disputed that the legacy was effectually assigned by her, subject only to this question, whether the claim of the executors in respect of the husband's debt ought or ought not to prevail against the title of the assignee.

The general law of the Court is, that a legatee, who is also a debtor to the testator's estate, cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt; and therefore that the executors may, in such a case, retain the debt out of the legacy, when payable. "It may be observed" (says Sir *E. V. Williams*, in his work on the Law of Executors (1)) "that the term 'set off' is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right of set-off. And such right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt." A legacy given to a married woman, but payable by law to her husband, is in the same position, for this purpose, as a legacy to the husband himself. Inasmuch, however, as the husband's right is subject to the wife's chance of survivorship, as long as the legacy is reversionary, and to her equity to a settlement when it becomes vested in possession during the marriage, the right of retainer for the husband's debt is also subject to those rights; and it would seem to be most consistent with sound principle that every right and power of the wife, as distinct from her husband, ought, in such a case, to prevail over the claim of retainer for the husband's debt.

As long as the fund is reversionary, the conditions necessary for the application of the legacy towards payment of the husband's

(1) 7th Ed. p. 1305.

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debt to the testator (whether the term "set off" or the term "retainer" ought to be used) do not exist. Nevertheless, I take it to be clear law, that the assignee of a contingent or reversionary legacy would, when the legacy became payable, be subject to this right, if the legatee would himself have been subject to it, in the absence of any assignment.

The first point to be determined is, whether Mr. *Lucas* ought, in this case, to be regarded as being, on the true construction of the statute 20 & 21 Vict. c. 57, the assignee of both the husband and the wife, according to their respective interests; or whether he is the assignee of the wife only, discharged from the *jus mariti* by her deed under the statute? If the latter, it must be further determined whether he takes the legacy discharged from all right of retainer which the executors might have asserted against the husband, or only from such beneficial interest as, subject to that right of retainer, might have been now remaining in the husband himself.

The statute says that "it shall be lawful for every married woman, by deed, to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in personal estate" (under any instrument, not being a marriage settlement, made after the 31st of December, 1857), "as fully and effectually as she could do if she were a *feme sole;* and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled under any such instrument as aforesaid." Property as to which she is restrained from anticipation by the terms of the instrument creating her title is excepted; and "no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as after directed"—that is, in the manner prescribed by the Act for the abolition of fines and recoveries for the acknowledgment and perfecting of deeds disposing of interests of married women in land.

23 L.D. 849

I am of opinion that, by an assignment duly made under this statute, the wife is enabled to pass and transfer personal property to which she is entitled in reversion, discharged from her husband's right, as fully and effectually as if she were a *feme sole;* and that

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the assignment ought not to be regarded as that of the husband and the wife according to their respective interests. This is apparent from three things: First, though the husband must concur in the deed, the power of disposing, not only of her own interest, but of that of her husband in her right, is in terms attributed to the wife; secondly, the words "as fully and effectually as if she were a *feme sole*" manifestly relate to the operation and not to the formalities of the deed; in respect of which latter the assignor is treated, not as a *feme sole*, but as a married woman; and, thirdly, the equity to a settlement is released and extinguished; manifestly not in favour of the husband or of his creditors, but so as to give to the assignee, immediately on the execution of the assignment, an absolute title.

23 L.J.Ch.849.

Unless, therefore, the concurrence of the husband in such a deed ought to be regarded as against equity, when the subject of the assignment is a legacy, out of which, if the husband had been entitled to reduce it into possession, the executors would have been entitled to retain a debt due from him to the testator's estate, the statute would appear to give Mrs. *Sloper's* assignee in this case as good a title as if that lady had been unmarried or a widow at the date of the assignment; in which case, of course, the husband's debt could not have been retained.

I am of opinion that the executor's future and contingent right of retainer, as against the husband, if he should eventually have become entitled to reduce this legacy into possession, did not estop the husband in equity from concurring with his wife in such a deed executed by her under this statute. It would doubtless have been otherwise, if he had himself previously dealt with his *jus mariti* in this legacy by any deed or contract for value; but the right claimed by the executors exists, if at all, by operation of law only, and not by any manner of contract.

23 L.J.Ch.850

It was, however, said that the words of the statute enabling a married woman to dispose of the future or reversionary interest "of such married woman, or her husband in her right," must be understood, as to the husband's interest in her right, under the deduction of all claims which, as against the husband, would have operated to reduce the *quantum* of his interest. This suggestion struck me at the time as very ingenious; but it is, in my opinion,

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unsound. It is not accurate to say, that claims which follow and attach themselves upon the husband's interest in the wife's right, operate by way of deduction from it. They are derivative from, or they may be adverse to it, but the existence and the *quantum* of the *jus mariti* itself are prior to, and in fact constitute the foundation of, all such claims. The construction suggested cannot, in my opinion, be reconciled either with the express declaration that the wife's disposition is to operate "as fully and effectually as if she were a *feme sole*," or with the absolute and unqualified extinguishment of her equity to a settlement.

If, before the statute, a testator had given such a reversionary legacy to a married woman whose husband was indebted to him, with a power to her to dispose of it while reversionary in the very words of this statute, and under the same condition so far as relates to the husband's concurrence, it cannot, I think, be doubtful that he would have created a power paramount to, and, in case of its exercise, exclusive of, any right of his executors to retain the husband's debt out of the wife's legacy. The effect of the statute is, in my opinion, the same.

The decree will, therefore, direct payment of the £350 legacy to Mr. *Lucas*, without any deduction on account of Mr. *Sloper's* debt to the testator's estate. As to the costs, I think that Mr. *Lucas* ought to be allowed the costs of his appearance to defend his title here and in Chambers, and that they ought not to be deducted from the Plaintiff's general costs of the suit.

Solicitors for the Plaintiff and her husband: Messrs. *Chappell & Son.*

Solicitor for the Executors: Mr. *J. B. Smith.*

Solicitors for Mr. *Lucas*: Messrs. *Webb, Stock, & Burt.*

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[1870 W. 111.]

Charitable Legacy—Pure and Impure Personalty—Direction to marshall.

A testator, after bequeathing an annuity and certain legacies, devised his real estate to trustees upon trust for sale, and directed the proceeds to be applied, so far as they would extend, in payment of his debts and funeral and testamentary expenses and the annuity and legacies. He then gave his personal estate to the same trustees upon trust to convert the same into money, and out of the proceeds pay so much of his debts and legacies as the proceeds of his real estate would not extend to pay, and to stand possessed of all the residue of his personal estate upon trust for certain charities; and he declared that only such part or parts of his estate and premises should be comprised in the residue thereof, and be divided, paid, or transferred to or among the charities, as might by law be given or bequeathed for charitable purposes. The testator was at the time of his death entitled to real estate and to pure and impure personal estate:—

Held, that the proceeds of the real estate and impure personal estate must be applied in payment of the debts and legacies before the pure personalty was resorted to.

Miles v. *Harrison* (1) and *Sturge* v. *Dimsdale* (2) observed upon.

THIS was the further consideration of a suit for the administration of the trusts of the will, dated the 29th of February, 1864, of *John Green*, who, after bequeathing an annuity and certain specific and pecuniary legacies (all of which he directed should be free of legacy duty), thereby gave and devised all his real estate unto or to the use of *Joseph Green Bourne* and *John Davies*, their heirs and assigns, upon trust to sell the same, and out of the proceeds of sale to pay all the costs and expenses attending the sale, and, subject thereto, thereout, in the next place, to pay all his debts, funeral and testamentary expenses, and the annuity and legacies and moneys thereinbefore given or bequeathed, and the legacy duties aforesaid, so far as the moneys or proceeds aforesaid would extend to pay the same; and the testator gave and bequeathed unto the said *Joseph Green Bourne* and *John Davies*, their executors, administrators, and assigns, all the moneys, stocks, funds, shares, securities for money, household goods, furniture, and

(1) V.-C. Wickens, June 7, 1873. (2) 6 Beav. 462.

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personal estate and effects of which he should die possessed, except such parts thereof as he had by his will specifically bequeathed or by any codicil thereto might specifically bequeath, upon trust that they the said *Joseph Green Bourne* and *John Davies*, and the survivor of them, should sell, dispose of, call in, and convert into money all such parts of his said personal estate as should not consist of money; and should thereout, and out of the money he might die possessed of, pay so much or such parts of his said debts, expenses, and legacies as the proceeds of sale of his real estate would not extend to pay, and should stand possessed of all the residue of his said personal estate, hereditaments, and premises, after satisfying the purposes aforesaid, upon trust that they his said trustees and trustee should pay, transfer, and divide the same unto and between the several hospitals, societies, or charities therein mentioned, and for the benefit of the same respectively, or the several persons thereinafter mentioned on behalf thereof, in equal shares or proportions. And the testator declared that the several shares of his said residuary personal estate were so bequeathed as aforesaid to be applied to and for the general purposes of the same charities, societies, or hospitals aforesaid. And the testator declared that only such part or parts of his estate and premises should be comprised in the residue thereof and be so divided, paid, or transferred as aforesaid as might by law be given or bequeathed for charitable purposes. And the testator appointed *Joseph Green Bourne* and *John Davies* executors of his will.

The testator made two codicils to his will, the 27th of March, 1869, and the 24th of May, 1869, neither of which is material for the purposes of this report. He died on the 31st of July, 1869.

The testator was at the time of his death entitled to real estate of the value of about £500, to impure personalty of about the same value, and to pure personalty of about the value of £12,000. The debts and legacies amounted to about £3000.

The question was, whether the proceeds of sale of the realty and the impure personalty were to be applied, as far as they would extend, in payment of the debts and legacies; or whether the debts and legacies were to be paid rateably out of the proceeds of the realty and the pure and impure personalty.

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Mr. *F. T. White* (Mr. *Roxburgh*, Q.C., with him), for the Plaintiff, who was beneficially interested under the will, and also one of the testator's next of kin, submitted that the debts and legacies must be paid rateably out of the three funds, or at all events rateably out of the pure and impure personalty after the proceeds of sale of the realty were exhausted, and that there could be no marshalling in favour of the charities: *Robinson* v. *Geldard* (1); *Beaumont* v. *Oliveira* (2); *Miles* v. *Harrison*, before Vice-Chancellor *Wickens* on 7th June, 1873.

Mr. *P. A. Kingdon*, Mr. *Cust*, and Mr. *Warmington*, for the several charities, submitted that the declaration in the will that only such parts of his estate should be comprised in the residue and be divided among the charities, was a direction by the testator to marshal to which the Court would give effect: *Wigg* v. *Nicholl* (3); *Nickisson* v. *Cockell* (4). In *Miles* v. *Harrison* there was no such direction, and the Vice-Chancellor had done no more than follow *Sturge* v. *Dimsdale* (5).

The LORD CHANCELLOR observed that some doubt had been thrown on *Sturge* v. *Dimsdale*.

Mr. *Fry*, Q.C., and Mr. *Phear*, for the trustees and executors.

Mr. *White*, in reply.

LORD SELBORNE, L.C., said that the testator in this case had, according to sound principles of construction, separated from the residue all which could not be effectually given to charity. The scheme of the will was this: first, the testator gave an annuity and certain legacies; then he devised his real estate upon trust for sale, and directed the proceeds of sale to be applied in payment of his debts and the annuity and legacies; and then he bequeathed his personal estate upon trust for payment of so much of the debts and legacies as the proceeds of the real estate might be insufficient to satisfy, and as to the residue, for charity. Then came

(1) 3 Mac. & G. 735.
(2) Law Rep. 4 Ch. 309.
(3) Law Rep. 14 Eq. 92.
(4) 3 D. J. & S. 622.
(5) 6 Beav. 462.

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the direction that only such parts of his estate should be included in the residue as might by law be bequeathed for charitable purposes. He therefore excluded impure personalty from the residue, and it followed by necessary implication that the impure personalty must be applied for those purposes which were to be satisfied before a residue was arrived at; it must, therefore, be applied in payment of debts and legacies, and there would be a declaration accordingly.

As to *Miles* v. *Harrison*, His Lordship had not before him the grounds on which Vice-Chancellor *Wickens* proceeded. If there was nothing more in the will than was stated in the report in the *Weekly Notes*, then, with all deference to the Vice-Chancellor, for whose opinion he had the highest respect, His Lordship would have been disposed to come to a different conclusion; but the words there were not so strong as in the present case, and it might be that, if the whole will were before the Court, it would be found that the Vice-Chancellor's opinion was well founded.

Solicitors: Mr. *W. M. Wilkinson*; Messrs. *Nicholl & Newman*; Messrs. *G. A. Crawley & Arnold*; Mr. *Needham*.

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PINKERTON *v.* EASTON.

[1870 P. 81.]

Solicitor and Client—Costs—Charge upon "Property recovered or preserved"—23 & 24 Vict. c. 127, s. 28.

In a suit by a residuary legatee against the sole surviving trustee of a testator's estate an administration decree was made, and it was ordered that a new trustee be appointed. The decree was carried into Chambers and the accounts brought in, when the Plaintiff stopped all further proceedings in the suit. On a petition by the solicitor who had acted for the Plaintiff in the suit, praying that his costs might be charged on the Plaintiff's interest in the estate, under 23 & 24 Vict. c. 127, s. 28:—

Held, that there had been no "property recovered or preserved" within the meaning of the Act, and that the solicitor was not entitled to any charge.

9 Ch. 659. 8 Ch D. 483. W.N. 81 (41) 8 P.D. 111 24 Ch D. 549, 550 47

PETITION.

This was a Petition by a solicitor for a charging order in respect of his taxed costs, under the statute 23 & 24 Vict. c. 127, s. 28.

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PINKERTON v. EASTON.

The suit was instituted by the Plaintiff, *Louisa Pinkerton*, against the sole surviving trustee and executor of *William Easton*, the testator in the cause, under whose will the Plaintiff was one of the residuary devisees and legatees, and it prayed that his estate might be administered, and the trusts thereof carried into effect, and also that a new trustee might be appointed.

The usual administration decree was made, and it directed that a new trustee should be appointed.

The decree was carried into Chambers and the accounts were brought in by the Defendant, but before the Chief Clerk had made his certificate, and before the appointment of a new trustee had been actually made, the Plaintiff stopped all further proceedings in the suit.

The Petitioner had acted as solicitor for the Plaintiff throughout the proceedings in the suit, and his bill of costs amounted to £92 14*s.* 1*d.* For this he had brought an action, and recovered judgment against the Plaintiff in the Court of Exchequer.

The Petitioner submitted that the decree was a beneficial decree for the Plaintiff, and for the other persons interested in the estate, and that the order appointing a new trustee was necessary and proper for the preservation and protection of the trust estate and the Plaintiff's interest therein, and prayed that the share of the Plaintiff in the said estate might stand charged with the payment of the amount due to the Petitioner for costs.

Mr. *Everitt*, for the Petitioner:—

The Petitioner, who acted as solicitor for the Plaintiff throughout the proceedings in the suit, is entitled to a charging order, under sect. 28 of 23 & 24 Vict. c. 127, on her interest in the estate. The Plaintiff was beneficially interested in a trust estate of which the Defendant was the sole surviving trustee, and the suit in which the decree was made was necessary for the preservation of the property.

In *Twynam* v. *Porter* (1), where a suit had been instituted by a *cestui que trust* against a trustee of real estate, praying for an account and reconveyance, and a receiver was appointed adversely to the Defendant, and where, after notice of motion for decree, but before the time for closing evidence, the Plaintiff, without the

(1) Law Rep. 11 Eq. 181.

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knowledge of his solicitor, entered into an agreement with the Defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the Plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid, it was held, on a petition by the solicitor under this Act, that he was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the Plaintiff, as having been recovered and preserved through his instrumentality.

Here the solicitor, who was employed to protect his client's interests, succeeded in obtaining a decree which would have the effect of preserving her property. He is, therefore, entitled, under the terms of the Act, to a charge upon the property, although the proceedings in the suit have been stayed at the instance of the client. In *Bailey* v. *Birchall* (1) a solicitor was held entitled to a charge upon property, recovered or preserved, for his costs of the litigation by which it was recovered or preserved, irrespective of his client's interest in the property, and although it turned out that his client had no interest therein.

In the case of *In re Fiddey* (2), the Court seems to have considered that the fact that a suit has been absolutely dismissed was no objection to an order under the Act being subsequently made in the suit.

LORD SELBORNE, L.C.:—

It has long been settled that the language of modern Acts of Parliament cannot be extended beyond its proper and natural meaning in order to meet particular cases. Here the Legislature has given, not a charge, but a power to the Court to create a charge for a solicitor's costs upon "property recovered or preserved," when meritorious services of the solicitor have resulted in such recovery or preservation. This has, undoubtedly, received a liberal interpretation, and has been held to apply even to property not belonging to the client, by whom the solicitor has been employed. It has also been applied to a case in which property was deemed to have been preserved by the appointment of a receiver,

8 L. R. 483.

(1) 2 H. & M. 371. (2) Law Rep. 6 Ch. 865.

upon an interlocutory motion before decree. The real question, in such cases, must be, whether proof has been given, to the satisfaction of the Court, of the actual recovery or preservation of property, by means of the suit; which is always a question of fact. Here no proof whatever is offered of the recovery or preservation of any property, except the mere fact that a decree of the most common kind, in the most common kind of suit, for the administration of an estate and the appointment of a new trustee, was made, but not prosecuted beyond bringing in certain accounts, as to which nothing special is alleged. I am of opinion that no "property" is shewn to have been "recovered or preserved," and I dismiss the Petition.

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Solicitor: Mr. *E. Peacopp.*

BRUNSKILL *v.* CAIRD.

L. C. for M. R. 1873 *Aug.* 7.

[1854 B. 102.]

Will—Settled Estates—Direction to invest Personalty in Purchase of Lands—Tenant for Life—Power to apply Personalty in Necessary Repairs.

Where the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person who should become tenant for life, and the accumulated fund and interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses:—

Held, that no part of such accumulated fund could be applied, at the instance of a tenant for life, in necessary repairs and improvements on the estate.

In re Lord Hotham's Trusts (1) not followed.

THIS was an application on behalf of the trustee in bankruptcy of one of the Plaintiffs, who was a tenant for life of real estates under a will, that the applicant might be at liberty to effect certain permanent repairs and improvements on a portion of the estate out of a fund belonging to the corpus of the testator's personal estate.

Stephen Brunskill, the testator in the cause, by his will, dated the 24th of December, 1850, devised his real estates, which were of considerable extent, to uses in favour of his sons and daughters

(1) Law Rep. 12 Eq. 76.

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in strict settlement, with a proviso that, during the minority of any person who should become tenant for life under the will, the trustees should receive the rents and profits of the estates, and, after certain payments thereout, should invest the surplus and the interest of the accumulations in government or real securities, and at the end of each period of accumulation therein provided for, or sooner if the trustees should think proper, call in or convert the accumulated fund, and apply the same in discharge of the principal sums of money which should then affect the estates, and lay out and invest the residue of the said money (if any) in the purchase of freehold estates to be settled to the same uses.

There was no power in the will to apply the said accumulated fund or the corpus of the testator's estate in repairs or improvements; but it was submitted on behalf of the applicant that the Court had jurisdiction to sanction such an application of the said accumulated fund, which was then represented by a fund in Court standing to the credit of the cause, and that the proposed repairs and improvements were necessary, and were of such a character as would permanently benefit the estate.

Mr. *Bristowe*, Q.C., and Mr. *Graham Hastings*, in support of the application:—

It is desirable to lay out a considerable sum of money in the necessary repairs and permanent improvement of the settled estates; and it is clearly for the benefit of the remaindermen that the proposed improvements should be made. We submit that, as the accumulated fund is directed by the will to be laid out in the purchase of other lands, the proposed application would come within the spirit of that provision.

The Court has acted upon a similar principle in cases under the *Lands Clauses Act*. Thus, in the case of *Re Incumbent of Whitfield* (1), where money was paid into Court by a railway company in respect of glebe land taken by them, it ordered it to be applied towards the cost of building a vicarage house, part of which was defrayed by the Governors of Queen *Anne's* Bounty.

In *Ex parte Davis* (2), where expenses had been incurred by a tenant for life under a will in reinstating structures on a portion of the devised property, in conformity with the requirements of

(1) 1 J. & H. 610. (2) 3 De G. & J. 144.

the *Metropolitan Building Act*, which authorizes the commissioners to sell the structures if the owner refuses or neglects to pay the expenses of re-instatement, it was held that these expenses constituted a charge on the property, and that their repayment was a proper application of the proceeds of other lands devised to the same uses and taken under the *Lands Clauses Consolidation Act*.

In a very similar case to the present, *In re Lord Hotham's Trusts* (1), Vice-Chancellor *Malins* held that the trustees of Lord *Hotham's* will might properly lay out part of his residuary personal estate, which was directed by the will to be laid out in the purchase of land, in rebuilding the parsonage house of an advowson on the settled estates, the house being in a ruinous state, and it appearing that the testator was about to rebuild it at the time of his death.

[The LORD CHANCELLOR said that the estates there were vested in the trustees, and the Court might possibly have been acting in the exercise of a general discretion as to their management. He could not treat that decision as an authority in the present case.]

Here the evidence shews that the estate will suffer if these repairs are not carried out; and we submit that the Court has jurisdiction to sanction such an application of the fund in Court.

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., Mr. *Hornell*, and Mr. *Whitehead*, for the several persons entitled in remainder, some of whom were infants, concurred in the application.

Mr. *Fry*, Q.C., and Mr. *Mander*, for the trustees of the will.

LORD SELBORNE, L.C.:—

I am of opinion that it would be doing too much violence to the language of the will to hold that the direction to lay out personal estate in the purchase of land authorizes the Court to lay out any part of it in repairs and permanent improvements, however necessary, on the settled estates, over which, the limitations being legal ones, the Court has no jurisdiction.

Solicitors: Messrs. *Lewis & Lewis*; Mr. *W. R. Harris*, agent for Mr. *J. H. Square, Kingsbridge*; Messrs. *Halse, Trustram, & Co.*

(1) Law Rep. 12 Eq. 76.

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June 11.

HOOD *v.* FRANKLIN.

[1868 H. 80.]

Marriage Settlement—After-acquired Property—Covenant to settle—Funds derived from Different Sources—Advancements.

Where a covenant to settle after-acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source.

Where a party, having entered into such a covenant, becomes entitled in possession to property which would be subject to the settlement if sufficient in amount, and which has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement.

THIS suit came on for further consideration.

The Plaintiffs were the trustees of an ante-nuptial settlement, dated the 11th of March, 1861, executed upon the marriage of the Defendant, *James Franklin*, with *Jessica Mary Blyth*, by which certain property of the intended wife was settled upon the usual trusts, and the Defendant *James Franklin* entered into the following covenant with the Plaintiffs, as the trustees of the settlement:—

"That if the said *James Franklin* now is, or at any time after the solemnization of the said intended marriage shall become, entitled in his own right, by devise, descent, bequest, gift, representation, or otherwise, to any real or personal property which shall amount or be equal in value to the sum of £200 for any estate or interest whatsoever, then the said *James Franklin*, and all other necessary parties, will, at the costs and charges of the trust estate, as soon as conveniently may be, convey, assign, and assure one equal half part of such real and personal estate, and all the estate and interest of the said *James Franklin* therein (except annuities or other property to which the said *James Franklin* is or may become entitled, for his life only, or for any term of years determinable on his death, jewels, trinkets, ornaments, plate, print, pictures, and books, none of which are intended to be included in

this covenant), unto and to the use of the trustees or trustee for the time being hereof, their or his heirs, executors, administrators, and assigns, according to the respective natures thereof, as to such part or parts of the same half-part of real and personal estate as shall not consist of money, upon trust, with all convenient speed, in such manner as the said trustees or trustee shall think fit, to sell and dispose of and convert the same into money, and to stand possessed of and interested in the moneys to arise by such sale, disposition, and conversion into money, and of and in the half part hereby covenanted to be settled of the moneys to which the said *James Franklin* may be or become entitled as aforesaid, and of and in all annual produce thereof respectively upon and for the trusts and purposes and with and subject to the powers, provisions, and declarations hereinbefore declared and contained of and concerning the moneys to arise by the sale or to be received in respect of the said share and premises hereinbefore assigned, and the annual produce thereof, or as near thereto as the deaths of parties or other accidents will admit of."

Then followed an exception varying the ultimate trusts from those in the settlement of the wife's property.

Elizabeth Franklin, the mother of *James Franklin*, died on the 30th of April, 1867, and on her death he became entitled in possession, under the will of *Grace Blundell*, which was dated the 12th of July, 1851, to one equal sixth share of the estate. He also became entitled in possession, on the happening of the same event, under the will of his father, *Henry Franklin*, which was dated the 18th of February, 1857, to one equal sixth share of his estate, and lastly, to one equal sixth share of the estate of his mother, under her will, dated the 25th of June, 1859. The interests which he took under the wills of *Grace Blundell* and his father were contingent on his surviving his mother.

By the Chief Clerk's certificate, which was dated the 17th of December, 1872, it appeared that the share of the estate of *Grace Blundell*, to which *James Franklin* was entitled amounted to £177 6*s*. 8*d*., and that his share of the estate of his mother amounted to £114 16*s*. 6*d*.

The estate of *Henry Franklin* had been administered in another

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suit of *Franklin* v. *Franklin*, and the total value as ascertained thereby was £9428 12*s.* 6*d.* This sum included a sum of £1213, which had been received by *James Franklin* at various times by way of advancement, during the life of his mother, under a power in his father's will, of which sum £300 was advanced before the date of the settlement, and the remainder subsequently.

The gross amount of the share of *James Franklin* in his father's estate was £1571 8*s.* 9*d.*, from which had to be deducted the above-mentioned sum of £1213, and sums amounting to £240 3*s.* 8*d.*, for the proportion of certain costs in the suit of *Franklin* v. *Franklin*, which were made chargeable against the share.

The result was that the amount now receivable by *James Franklin* on account of his share of his father's estate was only £118 5*s.* 1*d.*

The questions to be determined were, first, whether all or any of these sums were bound by the above-mentioned covenant in the settlement of the 11th of March, 1861; and, secondly, whether the advances were to be taken into account in estimating the amount of the share of the father's estate.

Mr. *Marten*, for the Plaintiffs:—

The parties interested in the settlement are entitled to have the shares of all these three estates brought into it. They have become payable at the same time, and together amount to more than £200.

But if the three sums cannot be added together, the sums received by way of advancement must be taken into account in estimating whether the share of the father's estate exceeds the specified sum, and as more than half the share has been received by him, the whole of the £118 5*s.* 1*d.* must be brought into the settlement.

Mr. *Smart*, for *James Franklin*:—

Where a covenant of this kind is limited to property accruing a any one time, the condition is implied that it must be derived from the same source: *Re Hooper's Trust* (1).

(1) 13 W. R. 710. 1 Jur. N.S. 479

It is only sums actually received which can be made subject to the covenant. Any means by which the receipt at any one time of a larger sum than the specified amount is prevented will defeat such a covenant: *Bower* v. *Smith* (1). Any advances made whilst the interest of *James Franklin* was contingent must be excluded.

Assuming that only the share of the father's estate was subject to the covenant, the question might have been determined in *Franklin* v. *Franklin,* and the present suit was unnecessary. The trustees ought, therefore, not to be allowed any costs.

SIR R. MALINS, V.C., after stating the facts, continued:—

I entirely assent to the decision in *Re Hooper's Trust* (2), in which it was held that the words "at any one time" implied "from one and the same source," and that any particular fund to which a covenantor became entitled did not fall within the covenant, unless by itself it amounted to the specified sum.

Now it appears that neither from *Grace Blundell's* estate, nor from that of *Elizabeth Franklin,* did a sum of £200 arise, and I am therefore of opinion that the covenant did not extend to either of those funds; and I think the trustees were bound, before embarking in this litigation, to take a rational course, and ascertain the amount which those estates were likely to produce. The bill is one which cannot be dismissed, or the Plaintiffs might have to pay the costs of the part relating to those estates.

As to the share in the father's estates, the facts are somewhat different. It seems that it consisted of £9428 12*s.* 6*d.*, and that, after all proper deductions were made, the share which *James Franklin* would have been entitled to receive was £1331 5*s.* 1*d.* Now the father's will contained a power of advancement. But the benefit of such a power can be lost by parting with the property in respect of which the advance is allowed to be made. And if a person settles a fund to which he may become entitled, and the receipt of which he has the power to anticipate by advancement, he cannot, after settling the fund, keep it out of the settlement by anticipating its receipt.

Therefore, as regards the actual advances, the £300 which was

(1) Law Rep. 11 Eq. 279. (2) 13 W. R. 710.

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advanced before the date of the settlement is gone; but as regards the £913 subsequently advanced, I am of opinion that in estimating the amount of the share of the father's estate it must be taken into account. The consequence is, that what *James Franklin* became entitled to receive on his father's death being more than £200, is within the covenant, and the trustees are entitled to have one half of it settled; and as he has himself received more than one half, the whole of the £118 5*s.* 1*d.* must be paid to the trustees. He will be entitled to receive the sums from the other estates himself.

Mr. *Smart* then said that, on the question whether those considerations applied to the case of anticipating a contingent interest by the exercise of powers of advancement, he wished to refer to *Atcherley* v. *Du Moulin* (1).

Mr. *Marten* referred to *In re Mackenzie's Settlement* (2); *In re Clinton's Trust* (3).

SIR R. MALINS, V.C.:—

I adhere to the view I have expressed, that, inasmuch as the whole of this fund would have been payable to *James Franklin* if he had not been advanced, the share must be treated as including the amount of the advancements. In *Atcherley* v. *Du Moulin* the property did not fall into possession during the coverture, and it can, therefore, have no application. Here it was the act of the covenantor which prevented his being entitled to receive a larger sum than £200.

These covenants rightly receive a strict construction, and are always held to be limited to property falling into possession during coverture. But I know of no case which has gone the length of deciding that where the fund is reduced below the specified amount by the act of the covenantor himself, it will not be bound thereby; and I think that, having entered into a covenant that all property to which he was or should become entitled should be settled, I cannot accede to the view that he could be entitled, by

(1) 2 K. & J. 190. (2) Law Rep. 2 Ch. 345.
(3) Law Rep. 13 Eq. 295.

receiving the fund in advance, to withdraw it from the operation of the covenant.

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The result, then, is, that property from three sources is claimed to be liable to be brought into settlement, and that as to two of these the contention wholly fails. I think the trustees have been a great deal too anxious about these funds. I cannot make them pay costs, but I shall give them none.

Solicitors: Mr. *Frederick Mason*; Messrs. *Belfrage & Middleton*.

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1873
July 9.

[1868 S. 227.]

Will—Construction—Conversion of Real Estate—Residuary Gift of Personal Estate—Period of Vesting—Death under Twenty-one.

A testator gave all his real and personal estate to trustees to convert into money, and out of the proceeds of the conversion to pay various legacies and annuities, and he directed his trustees to hold the residue of his said personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his decease, until they should attain twenty-one, and when they attained that age upon trust to pay or transfer the said residue of his said personal estate unto the four children in equal shares as tenants in common:—

Held, first, that the residuary clause passed all the real estate which the testator had before directed to be converted, as well as all the personalty:

Held, also, that the shares of the four children did not vest till twenty-one, and that the share of one child who died under twenty-one was undisposed of, and passed as to the realty to the heir-at-law, and as to the personalty to the next of kin of the testator.

Hanson v. *Graham* (1) distinguished. *Leigh* v. *Leigh* (2) not followed.

JOHN CLAY, by his will, dated the 10th of February, 1867, gave and bequeathed all the rest and residue of his personal estate which should not consist of money, and all his real estate, whatsoever and wheresoever, to *W. Wilson*, *W. Bentley*, and *M. Heanley*, upon trust to sell the same by public auction or private contract, as in their or his discretion should seem desirable, and within as reasonable a time as might be after his decease; and out of the moneys to arise from the sale, calling in, and conversion of his real

(1) 6 Ves. 239. (2) 17 Beav. 605.

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and personal estate as should not consist of money, and of the moneys of which he should be possessed at the time of his decease, to pay all his just debts, debts due on mortgage, and funeral and testamentary expenses, and after payment thereof to pay certain legacies therein mentioned; the testator also directed his trustees to pay thereout various annuities, including annuities to his three sisters, and upon the death of either of his said sisters, and as and when they might happen to die, upon trust to pay and divide the said legacies or shares as such shares might fall in, or the securities on which the same might be invested, unto his four natural children, *John Spencer*, *William Spencer*, *Albert Spencer*, and *Elizabeth Spencer*, by *Dinah Spencer*, or such of them as might be then living, as they should attain their respective majorities, or, being a daughter, should attain that age or marry. He then directed his trustees to invest a sum of £500, and pay the interest to *Dinah Spencer* during her life, and after her death to divide the same between his said four natural children. And he thereby declared that his trustees or trustee should hold the residue and remainder of his said personal estate so converted into money as aforesaid upon the trusts following, that is to say, that they, the said trustees or trustee, should pay or apply the annual income thereof (after investment as thereinbefore mentioned) unto or for the benefit of his said four children by the said *Dinah Spencer*, or such of them as might be living at his decease, as they should think proper, until they respectively should attain the age of twenty-one years, and when they should attain that age, or, being a daughter, should attain that age or marry, upon trust to pay or transfer the said residue of his said personal estate, or the securities whereon the same should be invested, unto the said four children in equal shares and proportions as tenants in common, for their own absolute use and benefit. The testator also gave power to his trustees to raise a fourth part of the expectant shares of his four illegitimate children for their education, advancement, or benefit in the world; and he devised all estates vested in him as mortgagee or trustee to his trustees, their heirs, executors, and administrators, but the moneys secured on such mortgages to be considered as part of his personal estate.

The testator died in February, 1868, at which time he was

seised of or entitled to considerable real estate, and he was also possessed of or entitled to considerable personal estate in addition to that specifically bequeathed by his will.

The Defendants, *Wilson* and *Bentley*, had acted in the administration of the estate, but *Heanley*, the third trustee, had disclaimed and had been dismissed from the suit.

The four natural children of the testator survived him; one had since died, and the other three were now all infants. The trustees had possessed themselves of the whole of the real and personal estate of the testator, and the real estate had been sold, and after satisfying all the debts and legacies, there would be a very large residue applicable to the trusts declared of the residuary estate of the testator.

The bill was filed for the administration of the said estate, and that new trustees might be appointed in lieu of *Wilson* and *Bentley*, and that a receiver should be appointed of the estate.

There were two questions raised for the decision of the Court which were argued separately. The first was, whether the words of the residuary clause were sufficient to pass the residue of the proceeds arising from the conversion of the real estate as well as the residuary personal estate; and the second was, whether, under the residuary clause, the share of the natural child of the testator, who died an infant, was vested immediately, with the payment only postponed till twenty-one, in which case the legacy would go to his representatives, and as he was illegitimate to the Crown, or whether there was no vesting of the legacy until the legatee attained twenty-one, in which case the legacy would either lapse, or would go to the three other illegitimate children.

Mr. *Pearson*, Q.C., and Mr. *Methold*, for the Plaintiffs, the three surviving natural children:—

The first question is, whether the undisposed of real estate passed under the residuary clause in this will.

If the words are sufficient to pass the residuary real estate, then the whole of the residue will go to the four natural children of the testator, subject to the subsequent question as to the period of vesting; but if, on the other hand, the words are not sufficient for this purpose, then there must be an intestacy as to the proceeds of

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the real estate. The form of the will is this: there is first a gift of all the personal estate not consisting of money, and all the real estate to the trustees, with a direction for sale, and then the whole of the bequests are carved out of that fund which is constituted of the personal estate and the converted real estate. The words are, "out of the moneys to arise from the sale, calling in, and conversion of the real and personal estate as should not consist of money, and of the moneys he should be possessed of;" and the residuary clause comprises "the residue and remainder of his said personal estate so converted into money as aforesaid." This must mean the whole of the estate which he had previously directed to be converted, as well as his pure personal estate. The testator directed the whole estate to be converted in the first instance, and treated as personalty; there is a clear intention to deal with it all, and to provide for his illegitimate children. The chief part of his property was real estate, and if there is an intestacy as to the real estate the effect will be to pervert the testator's intention, and to leave the children without sufficient provision. The authorities have decided that where the whole estate is first directed to be converted, and the proceeds are subsequently dealt with as personalty, the whole proceeds will pass under the residuary clause. This was so in the two leading cases upon the subject: *Mallabar* v. *Mallabar* (1) and *Durour* v. *Motteaux* (2), which have been followed in all similar cases.

Mr. *Hadley*, for one of the co-heiresses and next of kin of the testator:—

The personal estate must mean personal estate at the date of the will, and the real estate directed to be sold did not pass under the residuary clause. In the case of *Countess of Bristol* v. *Hungerford* (3), where there was a devise of real estate to be sold for payment of debts, the surplus, if any, to be deemed personal estate, and go to the testator's executors, it was decreed that the executors were trustees of the surplus for the testator's heir-at-law; and in *Wilson* v. *Major* (4) the proceeds of real estate were held not to pass under a residuary bequest, but resulted to the

(1) Cas. temp. Tal. 78.
(2) 1 Ves. Sen. 320.
(3) 2 Vern. 645.
(4) 11 Ves. 205.

heir. A similar decision was arrived at in *Kellett* v. *Kellett* (1); and in *Maugham* v. *Mason* (2) it was decided very distinctly that a fund arising from the sale of real estate would not pass under a residuary bequest of personal estate. That case was decided upon the general principle that where there is a direction to sell land for a particular purpose, the surplus will not form part of the personal estate so as to pass by the residuary bequest.

Mallabar v. *Mallabar* (3) was decided upon the intention of the testator, and it has been treated as being governed by its special circumstances, particularly as the giving of the residue, "after payment of debts and legacies as aforesaid," afforded an argument that it was intended to include the fund in question, which had been expressly subjected to those charges. The judgment proceeded on this, that the person to whom the real estate was devised in trust for sale was a person whom the testator intended especially to benefit; and therefore Lord *Talbot* thought she was entitled to retain the surplus.

[He also cited *Dixon* v. *Dawson* (4), *Collis* v. *Robins* (5), and *Jarman* on Wills (6).]

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the executors and trustees and one of the co-heiresses and next of kin, followed the same line of argument, and cited *Amphlett* v. *Parke* (7), where there was a direction that the proceeds of the sale of the real estate should be considered as part of the testatrix's personal estate, with a gift of the residue of the personal estate, and Lord *Brougham*, after an elaborate examination of the authorities, overruled Sir *J. Leach's* decision, and held that the heir was entitled.

Mr. *Hemming*, for the Attorney-General, supported the Plaintiffs' contention.

SIR R. MALINS, V.C.:—

This testator having both real and personal estate, and the principal portion of his estate being real, and having brothers and

(1) 3 Dow. 248.
(2) 1 V. & B. 410.
(3) Cas. temp. Tal. 78.
(4) 2 S. & S. 327.
(5) 1 De G. & Sm. 131.
(6) 3rd Ed. p. 552, *et seq.*
(7) 2 Russ. & My. 221.

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sisters and four natural children, his great object seems to have been to provide for his natural children, who were brought up by him, and treated as if they had been his legitimate children.

The testator, in the first place, gives all his personal estate which should not consist of money, and all his real estate, to his trustees with a direction to sell, and with the proceeds of the sale and the money which he should be possessed of to pay his debts and legacies. He thus, in the first place, deals with his property by putting it into one bulk; and having placed it all in the shape of personal estate, he directs his trustees to pay certain annuities to his three sisters, and pay and divide the fund from which the legacies are derived, as it should fall in, between his four natural children, or such of them as should be then living, upon attaining the age of twenty-one or marrying. He then directs a sum of money to be invested for the purpose of providing an annuity for the mother of his natural children, which was also to be divided upon her death between the children; and he then proceeds to deal with the residue. He directs his trustees to hold the residue and remainder of his said personal estate so converted into money as aforesaid upon trust to pay the income for the benefit of his four children, or such of them as might be living at his decease, until they should attain twenty-one or marry; and when they attained that age, upon trust to pay or transfer the said residue of his said personal estate unto the four children in equal shares as tenants in common.

The question is, whether this gift of the residue passes all his estate, or only so much as was the produce of personal estate.

Now, what did he mean? Collecting the meaning from the whole of the will, and looking at the form and purpose of the will, it appears to me that, having directed it all to be converted into money, when he speaks of his said personal estate so converted into money, he speaks of the entire property, both that which he had directed to be sold and that which was constituted of money.

The intention is, without doubt, to pass the whole of his real estate so converted into money, as well as his personal estate. If that is not the meaning, it must have been his intention to die intestate as to the greater portion of his estate.

Then, if the intention is clear, it is said that the authorities

prevent my putting that construction upon the will. It appears to me there is no authority approaching in any degree to an opposite construction in all the cases cited. *Mallabar* v. *Mallabar* (1) and *Durour* v. *Motteaux* (2) are authorities in favour of that interpretation. As regards the case of *Mallabar* v. *Mallabar*, I have never known it disapproved of in circumstances where that case applies. But it is said that in *Maugham* v. *Mason* (3) Sir *W. Grant* came to a different conclusion. I do not think that it differs in principle, and I should have entertained no more doubt than he did in that case. There the testator devised certain freehold chambers to trustees and their heirs upon trust to sell and apply the money arising by such sale towards payment of the legacies bequeathed by his will; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate after payment of his debts, &c., bequeathed the same to trustees upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir *W. Grant* held that the proceeds of the sale of the real estate, after payment of the legacies, resulted to the heir, and did not pass under the residuary bequest. That case was decided upon a different principle from *Mallabar* v. *Mallabar*. There the testator made the real estate one subject of gift, and the personal estate another. He stops short after disposing of his real estate, and then takes up the residue of his personal estate. So in this case, if the testator had begun by giving all his real estate in trust to sell and pay legacies, and then, by a subsequent clause, had taken up the personalty and disposed of that, then I should have had no doubt that as to the surplus of real estate there would have been an intestacy. But here the residue is formed of a mixed fund—that is, the personal estate, and the real estate which was directed to be converted.

All the cases proceed on the same principle. There is not, therefore, any approach to authority against what I have said, but all agree that in considering the will you must look at the intention, and give effect to it if you can. It must depend on the whole terms of the will. No case can be stated where, a testator

(1) Cas. temp. Tal. 78. (2) 1 Ves. Sen. 320.
(3) 1 V. & B. 410.

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having given all the property to trustees to be converted, and out of the bulk to pay debts and legacies, having then disposed of what it had become by his direction, it has been held that the residue did not pass the whole of the estate. I think, therefore, that the residuary clause passes all the estate which he had before directed to be converted, as well as all the personalty.

Mr. *Pearson*, Q.C., and Mr. *Methold*, for the Plaintiffs:—

It being now decided that the residuary clause passed the whole of the residuary property both real and personal, we have to discuss the second question, which is, who are the parties entitled to it. The trustees are to apply the income for the benefit of the four children as they should think proper until they respectively should attain the age of twenty-one years, and when they should respectively attain that age or marry, to pay or transfer the said residue unto the four children in equal shares and proportions as tenants in common. On behalf of the Plaintiffs, who are the three surviving children, we contend that the intention of the testator was to give the property between such only of the children as should attain twenty-one, and consequently that the share of the deceased child passed to such of the other children as should attain the age of twenty-one.

Pulsford v. *Hunter* (1) is a case shewing that the property would not vest before twenty-one. It was there argued that where maintenance was given it was equivalent to interest, and that the giving of interest had been held to vest the legacy; but the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to interest. So in *Batsford* v. *Kebbell* (2) the bequest was of the dividends which should become due after the death of the testatrix upon £500 bank annuities until the legatee should arrive at the age of thirty-two, at which time the principal was to be transferred, and it was held that the legacy failed by the death of the legatee under thirty-two.

Then, if the deceased child is excluded her share goes to the survivors as representing a class. The case of *Leigh* v. *Leigh* (3)

(1) 3 Bro. C. C. 416. (2) 3 Ves. 363.

(3) 17 Beav. 605.

is an authority in favour of that construction. There the testatrix bequeathed a share of her residuary estate to trustees for *Henry Leigh* for life, and after his decease she bequeathed the capital unto all the present born children of *H. Leigh* equally, share and share alike. By a codicil made after the death of one of the children she gave the residuary estate upon the same trusts as bequeathed by the will, and it was held that the bequest was made to a class, and that the surviving children were entitled to the share which the deceased child, if living, would have taken. Under any circumstances we contend that the shares of the children did not vest until they attained the age of twenty-one, and that the share of the deceased child is not undisposed of, but passed to the survivors.

The VICE-CHANCELLOR said that he could not follow *Leigh* v. *Leigh* (1).

Mr. *Glasse*, Q.C., and Mr. *Nalder* and Mr. *Hadley*, for co-heiresses of the testator:—

Our contention is the same as that on behalf of the Plaintiffs so far as submitting that the residue was not vested until twenty-one; but we also contend that the whole of the share of that child was undisposed of, and went to the heirs-at-law and next of kin of the testator. That was the case in *Leake* v. *Robinson* (2).

Mr. *Hemming*, for the Crown:—

I submit that there is an absolute vested gift in the four natural children of the testator, and that one having died, the share of that one vested in the Crown. The rule in all the authorities is, that where there is a gift to a child when it shall attain twenty-one, with the whole income given for maintenance in the meantime, that is a vested interest at once. In *Pulsford* v. *Hunter* (3) there was an intermediate gift of only so much of the income as the trustees thought fit to apply, which constituted a difference in the mind of the Judge; but if the whole of the capital is given at twenty-one, and the whole of the income is given for maintenance, there a vested interest passes. This principle was recognised and

(1) 17 Beav. 605. (2) 2 Mer. 363.
(3) 3 Bro. C. C. 416.

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acted upon in *Hanson* v. *Graham* (1) and *Watson* v. *Hayes* (2), and it is idle to cite earlier cases even if they may be thought inconsistent with the doctrine settled by those authorities. In the former of those two cases the legacy was directed to be paid at a certain period, and the interest was given to the legatee in the meantime. This legacy was held to be vested immediately. In the case of *Watson* v. *Hayes* there was a gift of £25 yearly for the maintenance of the testator's natural daughter until her age of twenty-one or marriage, when the executors were to pay her £500, and the testator directed that the interest of the trust funds should be appropriated to the maintenance of his children in equal shares until they attained twenty-one, when they should respectively receive the principal; it was there held by the Vice-Chancellor of *England* that the shares of the children vested notwithstanding their death under twenty-one, and that the legacy of £500 to the daughter vested notwithstanding her death under twenty-one, the £25 per annum given for her maintenance sufficiently corresponding to the interest. When this case came on upon appeal Lord *Cottenham* reversed the decision as to the legacy to the natural daughter, on the ground that the gift of £25 per annum did not represent the interest upon the £500 given at twenty-one; but he recognised the principle that a legacy which would be contingent upon the legatee's attaining twenty-one will become vested by a gift of the interest in the meantime.

This was the opinion of Sir *W. Grant* in *Hanson* v. *Graham*, and it is recognised by Sir *John Leach* in *Vawdry* v. *Geddes* (3), whatever may otherwise be thought of that decision. It is the giving of the whole interest which vests the capital. In *Davies* v. *Fisher* (4) there was a gift of property in trust for the children of *A.* as they severally attained twenty-five, the income to be applied during their respective minorities for their maintenance, with a gift over in case no child should live to attain twenty-one, and the interests of the children were held to be vested; and a similar decision was come to in *Bland* v. *Williams* (5). This has, in fact, been the undisputed law ever since *Hanson* v. *Graham*.

(1) 6 Ves. 239.
(2) 5 My. & Cr. 125.
(3) 1 Russ. & My. 203.
(4) 5 Beav. 201.
(5) 3 My. & K. 411.

In re Peek's Trusts (1) was not a decision upon the question whether the gift of the interest passed a vested interest in the capital. That was a question as to accumulations of surplus income, which we are not dealing with in this case. There, also, there was a gift over, and here there is none, and the decision by implication recognised the principle I contend for. Upon these authorities I submit that this is a vested gift of the capital, and not liable to be divested.

SIR R. MALINS, V.C. :—

I am satisfied that the construction argued on behalf of the Plaintiff would have been according to the intention of the testator, but I must find words to justify me in putting that construction upon the will.

The testator, as I have said, had four natural children, and I have already decided that the will passes all the residue of his estate, both real and personal, to those children. The clause is in these words: "Upon trust to pay or apply the annual income thereof unto or for the benefit of his said four children, or such of them as might be living at his decease, as they should think proper, until they respectively should attain the age of twenty-one years, and when they should respectively attain that age, or being a daughter should attain that age or marry, upon trust to pay or transfer the said residue of his said personal estate, or the securities whereon the same should be invested, unto his said four children, in equal shares and proportions as tenants in common, for their own absolute use and benefit." The testator also gave his trustees power to raise a fourth part of the expectant share of each child for their education and advancement or benefit in the world.

One child died under twenty-one; and on the part of the Crown it is contended that the property vested in the four children although they might not attain twenty-one; and that the Crown is entitled to the share of the one who did not attain twenty-one in the personal property.

Mr. *Hemming* has argued, on the authority of *Hanson* v. *Gra-*

(1) *Ante*, p. 221.

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ham (1), that when a legacy is given to be paid at a future period, with maintenance in the meantime, that vests the legacy, but it all depends on how it is given. If I found the capital the subject of one gift and the income of another, then I should not agree with that view of the case. Here the testator directs his trustees to hold the residue upon trust to apply the annual income for the benefit of his four children, or such of them as might be living at his decease, until they attained twenty-one. Up to that point nothing but the income is given; he then proceeds to direct that when they should attain twenty-one the trustees are to pay or transfer the said residue unto the said four children in equal shares for their absolute use and benefit. The attainment of the age of twenty-one is a condition precedent to anything vesting in the way of capital. The decision in *Hanson* v. *Graham* is dependent on a different principle. That was a gift by a testator to his three grandchildren of £500 Bank Annuities a piece when they should respectively attain the ages of twenty-one years or day of marriage, which should first happen, with a direction that the interest of the Bank Annuities should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one or day of marriage; and Sir *W. Grant* held that the legacies vested at the death of the testator; but that was on the principle that the gift amounted in substance to an absolute vested legacy in the first instance, the possession only being protracted to the period of twenty-one or marriage.

On the other hand, there is the case of *Batsford* v. *Kebbell* (2), where a testatrix bequeathed to *E.* the dividends which should become due after her death upon a sum of £500 Bank Annuities until he should arrive at the age of thirty-two years, at which time she directed her executors to transfer to him the principal sum for his own use; and it was held by Lord *Loughborough* that the legacy failed by the death of *E.* under thirty-two, on the ground that the testatrix had drawn a clear distinction between the dividends and the capital. The principle is, that where the interest alone is the subject of gift up to a particular time, and the principal is then for the first time given, the prior gift of the interest or dividends will not vest the capital.

(1) 6 Ves. 239. (2) 3 Ves. 363.

The same principle guided Sir *W. Grant* in deciding *Leake* v. *Robinson* (1). That was a gift of real and personal property to trustees in a certain event to pay and transfer the same to all the brothers and sisters of *B.*, share and share alike, upon his, her, or their attaining twenty-five, or if a sister, upon being previously married, with a direction to the trustees to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the meantime; Sir *W. Grant* held that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five.

That was followed by Sir *J. Leach* in *Vawdry* v. *Geddes* (2), which is precisely similar. There the testatrix gave the whole interest of her residuary estate to her four sisters, and directed that on their deaths the interest of their respective shares should be applied, at the discretion of the executor, to the maintenance, or accumulated for the benefit, of the children of each of her sisters so dying, until such children should respectively attain the age of twenty-two, when they were to be entitled to their mother's share of the principal, with limitations over in the event of the death of any of them under that age; and it was held that the children of the sisters were not to take a vested interest till they attained twenty-two. Sir *J. Leach* there said that the case was governed by *Leake* v. *Robinson*, and that even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested.

In *Watson* v. *Hayes* (3) there was a direction to the executors to apply £25 per annum for the maintenance of the testator's natural daughter till twenty-one or marriage, when the executors were required to pay her £500. She died under twenty-one and unmarried, and it was held that the legacy failed.

I decided *In re Peek's Trusts* (4), lately before me, upon the same principle. There the testator directed his trustees to pay the income of £5000 to his nephew, for his maintenance or education, until he should attain the age of twenty-four, and to pay him the capital when he should attain that age; and if he should die

(1) 2 Mer. 363.
(2) 1 Russ. & My. 203.
(3) 5 My. & Cr. 125.
(4) *Ante*, p. 221.

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under that age, then over. The nephew survived the testator, and died under twenty-four. At his death there were accumulations of income in the hands of the trustees which had not been applied for the purposes of maintenance; and I held that this surplus belonged to the nephew's representatives, on the ground that the legacy was vested, liable to be divested, and that the income and capital were subjects of separate and distinct gifts.

On this principle, I come to the conclusion that the income being the subject of one gift and the capital of another, there is no gift of capital except to those of the children who attain twenty-one. This child did not attain twenty-one, so the gift of the capital failed altogether as regards his fourth share.

I cannot accede to Mr. *Pearson's* argument, that where a testator gives property to four persons of a class and one dies, the share of the one so dying goes to the survivors. In my opinion the legacy lapsed, and that share being undisposed of will go, as regards the real estate, to the heir-at-law, and as regards the personal estate to the next of kin of the testator, and the Crown is not entitled to any portion of it.

As to the intention of the testator, if any person had framed this will who understood the effect of the terms, he would have given the residue to such of the children of the testator as should attain the age of twenty-one; but as it is, the clause does not carry out the evident intention of the testator.

Solicitors for the Plaintiffs: Messrs. *Johnson & Master.*

Solicitors for the Crown: Messrs. *Raven & Bradley.*

Solicitors for other Parties: Messrs. *Scott & Co.;* Messrs. *Norris, Allens, & Carter.*

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1873
July 16.

[1871 W. 137.]

Will—Construction—Ambiguity—Description of Legatee—Evidence.

Where a legatee is once correctly described in a will, and the same name is mentioned again without any description, evidence is not admissible to shew that a different person was intended.

18 L. 427
19 L. 505,

MARTHA AMELIA WEBBER, by her will, dated the 2nd of June, 1870, after making several specific bequests, gave certain specified articles to her niece *Clara*, whom she described as the eldest daughter of her brother *John Huish Webber*. She then gave certain other articles to another niece, whom she described as "my niece *Laura*, second daughter of my said brother *John Huish Webber*," and she made some further specific gifts to another niece *Rosa Webber*, the Plaintiff, whom she described as the youngest daughter of the same brother.

The testatrix made other specific gifts, and gave her residuary estate to the Defendants, *Thomas Corbett* and *Charles Sankey*, whom she described as her executors, but did not expressly appoint as such, and directed them to get in and convert her estate into money, and to pay her debts, funeral and testamentary expenses, and to stand possessed of the residue upon trusts, which were expressed as follows:—"To my said brother *John Huish Webber* the sum of £19 19*s*. To my brother *William Webber* an annuity during his life of £50 free from legacy duty; and I direct that the said annuity shall be considered as accruing from day to day, and shall be paid by equal quarterly payments, and that the first quarterly payment thereof shall be made at the expiration of three calendar months next after my death. To each of my nieces, *Kate Gilbert*, the wife of *John Gilbert*, of the city of *Cork*, *Ireland*, *Hannah Maria Thomas*, the wife of *Frederick Thomas*, of *Birmingham*, *Harriet Bird*, the widow of *John Bird*, of *New Zealand*, and *Laura Webber*, the sum of £50, and *Mary Anne*, the wife of *John Huish Webber*, junior, the sum of £100. To each of my nephews, *Henry Webber*, *Arthur Wynn Webber*, and *Edwin Vincent Webber*

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(sons of my brother *William Webber*), *George Webber*, youngest son of my brother *John Huish Webber*, and *William Webber*, of *Bourne, Lincolnshire*, the sum of £50. To each of my nieces, the said *Clara Webber*, *Laura Webber*, *Martha Elizabeth Sarah Sankey*, and *Emma Georgiana Morris*, the sum of £100. To my grand-niece *Martha Amelia Webber* the sum of £100. To each of them the said *Thomas Corbett* and *Charles Sankey* the sum of £100, in consideration of any trouble they may be put to in carrying out the trusts of this my will; and as to all the rest, residue, and remainder of the moneys to arise from such sale, collection, and conversion into money as aforesaid, and all other my residuary moneys and estate, in trust for the said *Martha Elizabeth Sarah Sankey*, *Laura Webber*, *Emma Georgiana Morris*, and *Rosa Webber*, share and share alike."

The testatrix had three nieces, who were the daughters of her brother *John Huish Webber*, namely, *Clara Webber*, the Plaintiff *Rosa Webber*, and *Laura Webber*. She had two nieces, who were the daughters of her late brother *James Webber*, namely, Mrs. *Sankey* and Mrs. *Morris*; and five nieces, who were the daughters of her brother *William Webber*, namely, Mrs. *Gilbert*, Mrs. *Thomas*, Mrs. *Bird*, the legatees of those names, *Mary Anne Webber*, who had married a son of the testatrix's brother *John Huish Webber*, and was the legatee of that name, and *Laura Frances Tomkin Webber*.

The question to be determined was, which of the testatrix's nieces was entitled to the legacies given to *Laura Webber*, including the share of the residue. In pursuance of an application in Chambers in the suit evidence had been gone into on the subject, and it appeared that she had been accustomed to address both *Laura* and *Laura Frances Tomkin*, both verbally and in writing, simply as *Laura*, and was on friendly terms with both. Latterly, however, the family of *John H. Webber* had been living much nearer to her than that of *William Webber*, and she had seen much more of them. She had also become much attached to *Laura*, *John's* daughter, who, since the marriage of Mrs. *Sankey*, who had previously lived with her, had often been an inmate of her house, and attended to her in her last illness. The testatrix had, moreover, expressed strongly her affection for this niece, and during the

last months of her life did not seem pleased with the visits of her niece *Laura Frances Tomkin.*

The suit now came on for further consideration.

Mr. *Pearson,* Q.C., and Mr. *Berkeley,* for the Plaintiff.

Mr. *Cotton,* Q.C., and Mr. *Cookson,* for *Laura,* the daughter of *John Huish Webber*:—

Where there is no patent or latent ambiguity in a will evidence is not admissible to shew who was intended to take a gift: *Doe* v. *Westlake* (1); *Wigram* on Wills (2); *Bernasconi* v. *Atkinson* (3); *In re Kilvert's Trusts* (4). Here the testatrix has described the person who was intended to take the gifts.

[THE VICE-CHANCELLOR:—I am very much inclined to think that when a person is once properly described in a will, and the same name occurs again, the same person must be presumed to be intended.]

In the present case there is neither patent nor latent ambiguity, and the will can be read without any extrinsic aid: *Wigram* on Wills (5). *Jefferies* v. *Michell* (6) may be supposed to have some analogy, but it was a case of latent ambiguity.

If the evidence is gone into it is conclusive in favour of *Laura,* the daughter of *John.*

Mr. *Glasse,* Q.C., and Mr. *Lonsdale,* for *Laura Frances Tomkin Webber*:—

There is sufficient on the face of the will to shew that the testatrix had the families of all her brothers in her mind, and it is quite certain from the will itself that she could not have intended the same person to take the two pecuniary legacies. As regards the £50 legacy, the *Laura* there mentioned in conjunction exclusively with the children of *William* must be considered to be *Laura Frances Tomkin.* The fact of two of the christian names being omitted has no weight: *Bennett* v. *Marshall* (7); and the fact

(1) 4 B. & A. 57.
(2) 4th Ed. p. 27.
(3) 10 Hare, 345.
(4) Law Rep. 7 Ch. 170; Ibid. 12 Eq. 183.
(5) 4th Ed. p. 57.
(6) 20 Beav. 15.
(7) 2 K. & J. 740.

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of the two legacies being given is a latent ambiguity which lets in evidence.

Then, assuming that *Laura*, the daughter of *John*, takes the second pecuniary legacy, the question of the disposition of the residue remains. The scheme seems to have been to take some one to represent each of the testatrix's brothers, and this view is aided by the collocation of the several nieces.

On the evidence, if admitted, it appears that the testatrix was on good terms with both families. It is, consequently, consistent with either view.

SIR R. MALINS, V.C., after shortly stating the will and the other facts, continued:—

The point that strikes me to be surmounted in this case is this: There is one niece *Laura* very distinctly described in the will as the second daughter of testatrix's brother, *John Huish Webber*. Having very accurately described one niece *Laura*, when in another part of the will the testatrix speaks of her niece *Laura* without any additional description, or anything which can in any way apply to any other person, I am of opinion that the will throughout must be read as having reference to the same niece who was before accurately described; and, therefore, in the bequest of the legacy of £100, I am of opinion that she meant the same *Laura* who was before described, namely, the second daughter of her brother *John Huish Webber*.

The chief question, however, is as to the residuary gift, and who is meant by the *Laura Webber* therein mentioned.

I entirely agree with the authorities which have been cited, and in the absence of any authority I should have come to the conclusion that *Laura Frances Tomkin Webber*, for the purposes of this will, must be regarded as *Laura Webber*, because she is still *Laura Webber*, and as much so as the daughter of *John*, who is *Laura* only. That point is decided in *Bennett* v. *Marshall* (1), in which there were two persons in the same degree of relationship to the testator, one named *William Marshall* and the other *William John Blandford Marshall*. The decision was, that they were both to be

(1) 2 K. & J. 740.

regarded as simply *William Marshall,* and that there was a latent ambiguity, to remove which parol evidence was admitted. In this case, therefore, if there had been nothing but the simple description of "*Laura,* my niece," I should have held it to have been perfectly clear that, as there were two nieces of the name of *Laura,* parol evidence might be resorted to to shew which was meant. But upon the face of this will, I am very much disposed to think that parol evidence is not admissible at all, for the reason that there is only one niece *Laura* named in the will, and she is accurately described; and, therefore, no other can be resorted to. I think, therefore, that the principle of the case of *Doe* v. *Westlake* (1) is applicable to this case. In that case Lord *Tenterden* says (2): "It is unnecessary to consider whether this verdict was against the evidence, for I am very clearly of opinion that the declarations of the testator ought not to have been received in evidence at all. It is perfectly true that a latent ambiguity may be raised by the proof of some fact not to be collected from the will itself; but then the fact must be such as, when proved, will raise an ambiguity in the will. Now, the fact of the three brothers of the testator having each a son of the name of *Simon* does not raise any ambiguity upon this will. The devise upon which the question turns forms a distinct, independent sentence, and is in these words, 'I give, devise, and bequeath unto *Matthew Westlake,* my brother, and unto *Simon Westlake,* my brother's son.' Now it seems to me that, in point of legal construction, when the testator is speaking of his brother's son he must be taken to speak of the son of that brother who was then particularly in his mind. *Matthew Westlake* was the brother then in the mind of the testator, and, consequently, *Simon Westlake,* his son, must be the person intended. Admitting it, therefore, to be the fact that the testator had three brothers, each of whom had a son of the name of *Simon,* I cannot entertain the least doubt that he intended by this devise to give the property to *Simon* the son of *Matthew Westlake.* If that be so, there was no ambiguity in the will, and therefore the evidence ought not to have been received. I am, therefore, of opinion that there is no ground for a new trial."

I say in this case the testatrix has described whom she means by

(1) 4 B. & A. 57. (2) 4 B. & A. 58.

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her niece *Laura*, namely, the second daughter of her brother *John Huish Webber*. If she had meant the other *Laura*, it was incumbent upon her, having once described her niece *Laura*, to have added the words, "*Laura*, the daughter of my brother *William*."

I adhere to the principle that, having once described the niece in a manner which removes all possibility of doubt, whenever she mentions her niece afterwards it must be presumed that she intended the same person; and, therefore, that in point of law the gift of the legacy of £50 to *Laura Webber* is to the same *Laura Webber* before named, and the gift of the £100 "to the said *Laura Webber*" is also to the one who was before mentioned and accurately described. For the same reason, when in the residuary clause she says, "In trust for the said *Martha Elizabeth Sarah Sankey, Laura Webber, Emma Georgiana Morris*, and *Rosa Webber*, share and share alike," "the said *Laura Webber*" must mean that *Laura Webber* who was alone previously mentioned, namely, the second daughter of her brother *John*. Therefore, knowing the state of the family, that is the conclusion I come to upon the construction of the will itself.

But in Chambers, where, of course, causes of this kind cannot be fully argued, it seems that I decided that parol evidence was to be gone into. I cannot much regret that this has been done, because it has perfectly satisfied me that the intention was in accordance with my decision.

[His Honour then discussed the evidence and continued:—]

With regard to the share of the residue and the legacy of £100, I think it is quite clear, for the reasons I have stated, that *Laura*, the second daughter of the testatrix's brother *John*, was intended; and I think the same construction must be maintained throughout the will. The consequence is, that she not only according to law takes the legacy of £100, but also the legacy of £50.

But if I am at liberty to conjecture, I have no doubt whatever that *Laura* the daughter of *William* was intended to take the legacy of £50 for two reasons: first, that she is collated with her sisters and not with the family of *John;* and I presume the family of *William* were intended to take; and further, from the circumstance that there is within six lines a legacy of £100 given to

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Laura, who I must hold was *Laura* the daughter of *John*. It is so improbable that the testatrix, within so short a space, would give two legacies to the same person, that I must come to the conclusion that she really intended two different persons, and that the legacy of £50 was intended for one *Laura*, and the legacy of £100 for another.

Therefore, though in point of law the £50 and the £100 both, in my opinion, go to *Laura* the daughter of *John*, in point of equity and justice I am clearly of opinion the £50 ought to go to the other. But that I must leave to the parties themselves.

Solicitors: Mr. *J. H. Webber*; Messrs. *Lee, Pemberton, & Reeves*; Messrs. *Iliffe, Russell, & Iliffe*.

V. C. M. 1873 *July* 23.

In re KING'S LEASEHOLD ESTATES. *Ex parte* EAST OF LONDON RAILWAY COMPANY.

Company—Compensation—Leasehold Interest—Tenant from Year to Year—Statute of Frauds.

A. agreed, in writing, to let to *B.* certain premises at a rent of £36, payable quarterly; and not to raise the rent or give *B.* notice to quit so long as he continued to pay the rent when due. *A.* (who had only a leasehold interest to expire in 1881) had also agreed verbally with *B.* to let him remain in the premises for such term of years (not exceeding *A.'s* term therein) as *B.* might desire to continue tenant thereof. A railway company contracted to purchase the interest of *B.* in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of *A.*, which term will expire in 1881. The company disputed *B.'s* title to the interest described, and paid the purchase-money into Court:—

Held, that the relation of landlord and tenant made *B.* a purchaser for valuable consideration to the extent of his lease; that the *Statute of Frauds* was no bar in equity to *B.'s* claim; that *B.* was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money.

THIS was a Petition by *John King* and *Charles King*, stating that in March, 1871, *Thomas Warren*, being entitled to a dwelling-house, shop, and yard, known as No. 4, *Watney Street, Commercial Road*, for the residue of a term of twenty-one years from the

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25th of December, 1860, entered into a verbal agreement with the petitioner, *Charles King*, to let the aforesaid hereditaments to him at the annual rent of £36 for such term of years (not exceeding the term of the said *Thomas Warren* therein) as *Charles King* might desire to continue tenant thereof, and on the 25th of March, 1871, in order to effectuate such verbal agreement, an agreement in writing, signed by *Thomas Warren* and *Charles King*, was entered into, and was in the following words: "I, *Thomas Warren*, agree to let to *Charles King* the shop and premises situate number 4, *Watney Street*, *Commercial Road*, in the parish of *St. George's East*, in the county of *Middlesex*, at the yearly rental of £36, payable quarterly. The said *Charles King* to pay all taxes (except property tax); and I further agree not to raise the rent or give the aforesaid *Charles King* notice to quit as long as he continues to pay the rent when due." *Charles King* entered into the said agreement, and accepted the tenancy thereby created as a trustee for and on behalf of the petitioner, *John King;* the rent of £36 therein reserved had been regularly paid to *Thomas Warren*, when due, down to the 25th of March, 1873.

The *East London Railway Company* having required, for the purposes of their railway, the said hereditaments No. 4, *Watney Street*, and being entitled to purchase the same, entered into an agreement in writing, on the 16th of January, 1873, by their agent Mr. *Clifton*, with *John King*, for the purchase of the estate and interest set forth in the schedule thereto, and claimed by him, in the hereditaments mentioned in the agreement, at the price of £470, which sum was to include compensation for severance and accommodation works of all kinds, and also for damages of every description, whether for removal, inconvenience, loss of trade, goodwill, or otherwise, which the vendor might be entitled to by reason of the exercise of the powers of the company; and it was provided by the agreement that the vendor should, whenever required by the company, furnish dates and short particulars of all deeds and documents of title in his possession or power relating to the hereditaments. The description of the property, as set forth in the schedule to the said agreement, was as follows: "A house, shop, workshop, yard and premises, being No. 4, *Watney Street, Commercial Road*, held of *Thomas Warren* for any term at

tenant's option, but not beyond the term and interest of the said *Thomas Warren* in the premises, which term will expire on the 25th of December, 1881, at the rent of £36 per annum."

Shortly after the date of this agreement the petitioners delivered to the company a copy of the agreement of the 25th of March, 1871, which was the only deed or document of title in their possession, and the company thereupon alleged that according to the true construction of such agreement the petitioner *John King* was a tenant from year to year only of the hereditaments No. 4, *Watney Street*, and had no other estate or interest therein, and that he had failed to make out a title to the interest in the hereditaments claimed by him in the agreement of the 16th of January, 1873, and accordingly the company paid into Court the said sum of £470.

The Petitioner, *John King*, submitted that he had made out a title to the interest in the aforesaid premises claimed by him and agreed to be sold, and accordingly that he was entitled to the sum of £470 so paid into Court by the railway company.

The Petition prayed that the said sum might be paid out to the Petitioner, and that his costs of the purchase and taking of the premises, or which had been incurred in consequence thereof, might be taxed and paid.

Mr. *Glasse*, Q.C., and Mr. *Whitworth*, in support of the Petition:—

We submit that the Petitioner has the interest in these premises which he agreed to sell to the railway company. The agreement entered into between *Charles King* and his landlord was a valid agreement for the lease of the whole interest of the lessor if the rent was regularly paid. The description of the interest is perfectly correct, namely, "a house and premises in *Watney Street* held of *Thomas Warren* for any term at tenant's option, but not beyond the term and interest of *Thomas Warren* in the premises, which term will expire on the 25th of December, 1881, at the rent of £36 per annum." The tenant was, therefore, entitled to the whole lease of the landlord, which was for about ten years, and the agreement could be enforced in equity. The railway company must have well known the position in which the Petitioners stood,

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and they could have had no ground for refusing to complete the contract. The money ought, therefore, to be paid to the Petitioners as well as the costs occasioned by the conduct of the company in paying the amount into Court.

Mr. *Fooks*, Q.C., and Mr. *Wright*, for the railway company:—

The Petitioners have no right to receive the money which has been paid into Court. They entered into the contract with the company without giving a sufficient explanation of their interest, which is nothing more than a tenancy from year to year. There is no consideration for the agreement set up with their landlord, and there is no fixed term for which the lease is to continue, consequently there is no contract which this Court could enforce. In *Warner* v. *Browne* (1) there was a consideration for the lease, which makes that a different case.

This contract is not sufficient to satisfy the *Statute of Frauds*. In the case of *Fitzmaurice* v. *Bayley* (2) there was an agreement to let certain premises "for the same rent, and subject to the same conditions, that I hold them myself;" and it was decided that this paper, even though ratified by the proposed lease, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute.

In *In re Stroud* (3) an interest similar to this was held to be a tenancy from year to year. There *A.* agreed to let to *B.* a piece of land at an annual surface rent, the land was to be used for brick-making, and the tenant was to pay a fixed sum per thousand. A portion of this land was taken by a railway company, and *B.'s* claim for compensation was referred to an arbitrator, who found that *B.'s* interest under the agreement was that of tenant from year to year, and the Court held this construction to be correct. The company had no means of ascertaining what interest the occupier of the property had except from his own statement, and they assessed the value before they had seen the agreement. Where this is the case, and it turns out afterwards that the claimant is not possessed of the interest he claims, but some different interest,

(1) 8 East, 165; 14 Ves. 156, 409. (2) 9 H. L. C. 78. (3) 8 C. B. 502.

the Court will not maintain the contract, but will apply its own ordinary machinery to ascertain the value of the actual interest, and after paying the amount of such value to the claimant will return the remainder of the money to the company. This was done in *Brandon* v. *Brandon* (1), and we submit that the same course should be adopted in this case.

SIR R. MALINS, V.C.:—

The question here is, whether the vendor has the interest which he claims.

It appears that one *Thomas Warren* held the property in question upon a lease for twenty-one years, commencing in 1860, and in 1871, when between ten and eleven years of his lease had run out, he agrees to let the property in this way: "I, *Thomas Warren*, agree to let to *Charles King* the shop and premises situate No. 4, *Watney Street, Commercial Road*, in the parish of *St. George's East*, in the county of *Middlesex*, at the yearly rental of £36 payable quarterly; the said *Charles King* to pay all taxes (except property tax); and I further agree not to raise the rent or give the aforesaid *Charles King* notice to quit as long as he continues to pay the rent when due." I must assume that the parties knew each other's position, and that *King* was a purchaser for valuable consideration, which a tenant always is. The relation of landlord and tenant makes the tenant a purchaser for valuable consideration to the extent of his lease, and he has all the advantages of a purchaser for valuable consideration. Every circumstance which would avail a purchaser in fee simple as a purchaser for valuable consideration would equally avail a lessee for years to the extent of his term. That will be found very expressly laid down again and again by Lord *St. Leonards*. Therefore, as the lessee was a purchaser for valuable consideration, I assume that he knew the extent of the interest of the lessor, which was about ten years unexpired. Then he agrees to the terms of the lessor, that he is to enter into possession, and that he is not to have any notice to quit so long as he pays the rent. Mr. *Fooks* and Mr. *Wright*, for the railway company, say that that creates no interest. First of all this is not an arbitration, but a deliberate

(1) 2 Dr. & Sm. 305.

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agreement entered into by the tenant *King* of the one part and the railway company, by Mr. *Clifton*, their agent, of the other part, and I must assume that the company knew the nature of the interest when the contract was entered into, and they deliberately contracted to pay him £470 for that interest. They come now and say that he had no interest whatever. I think that is not open to them, but if it was open to them, can they with propriety say it? When a man has a contract with his landlord, who is himself interested for a term of years only, it is not necessary to go into the question what would be the effect if the landlord were seised in fee. The question of the duration of such an interest it is not necessary for me to consider. This is a case in which the lessor had only ten years unexpired, and having that term unexpired he says to his tenant, "If you pay your rent I will never give you notice to quit, and will not disturb you." Is that an interest, or is it not? That question arose before Lord *Eldon* in *Browne* v. *Warner* (1), a case precisely the same as this; I am unable to distinguish one case from the other, except that in that case there was £40 consideration paid, which Mr. *Fooks* seems to attach great importance to. He says in this case there is no consideration. The relation of landlord and tenant, I have already said, is a consideration; it is not necessary in a contract for a lease to pay any money; the fact that he has agreed to take the lease is itself a consideration. In *Browne* v. *Warner* the contract was a "memorandum of agreement made the 6th day of March, 1801, between *W. Warner* and *J. Browne*. *W. Warner*, in consideration of £40, doth agree to let, and *J. Browne* doth agree to take a messuage (described) at £40 per annum clear rent to be paid quarterly, &c. And it is further agreed that *W. Warner* shall not raise the rent nor turn out *J. Browne* so long as the rent is duly paid quarterly and he does not expose to sale or sell any article that may be injurious to *W. Warner* in his business. And it is further agreed that in case of removal *J. Browne* shall be at liberty to receive the aforesaid sum of £40 of the next tenant *W. Warner* shall accept." Notwithstanding that contract *Warner* persisted in treating his tenant as a tenant from year to year, and accordingly brought an ejectment against him, and at law of course succeeded.

(1) 14 Ves. 156.

That stage of the case is reported (1). The landlord having succeeded at law, the tenant filed a bill in equity, to which the landlord demurred, and Lord *Eldon* overruled the demurrer. It did not stop there. There had been an injunction, and upon an answer filed in the case a motion had been made for dissolving the injunction unless cause was shewn—according to the practice of that day. How was that dealt with by Lord *Eldon*? By overruling the demurrer he decided that there was an interest, and consequently he continued the injunction to the hearing of the cause. There, as far as I know, the case ends. I suppose the parties, finding Lord *Eldon's* opinion was that there was an equitable interest, did not go any further, and the tenant continued in possession. Therefore, upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interest exists. What his right would be against the tenant in fee may be more difficult; it may not extend beyond his own life. Lord *Eldon* did not go into that question, but held that he had an interest. I am clearly of opinion that a tenant with such an agreement would not be allowed by this Court to be turned out of possession, although he has no defence at law. If he filed a bill here I am perfectly satisfied that this Court would restrain the landlord, and on these grounds, therefore, I am of opinion, first, that he had an interest under this contract, which entitled him to the money the company agreed to pay him; and, secondly, I am of opinion that the company entered into the contract with a distinct knowledge of what his interest was, and by their agents have agreed to give £470 for that interest, which £470, therefore, must be paid to the Petitioner, and the costs must be paid by the company.

Solicitors for the Petition: Messrs. *Hillearys & Tunstall.*

Solicitors for the railway company: Messrs. *Wilson, Bristows, & Carpmael.*

(1) 8 East, 165.

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1873
July 30.

WHITEHEAD *v.* WHITEHEAD.

[1871 W. 203.]

Specific Legacy—Dividends—Apportionment Act, 1870.

The income arising from personalty specifically bequeathed is not apportionable under the *Apportionment Act*, 1870, as between the specific legatee and the estate of the testator.

RALPH RADCLIFFE WHITEHEAD, who carried on a business called the *Wandle Felt Company*, by his will, dated the 8th of November, 1870, gave one undivided third of the business to his wife or the trustees of her marriage settlement, and another undivided third to *William Wright Thomson*. He then recited that he intended to turn the *Wandle Felt Company* into a limited company under the provisions of the *Companies Acts*, 1862 and 1867, and directed that, in case such conversion should take place in his lifetime, the bequests of the two third parts of the *Wandle Felt Company* business should be treated as absolutely revoked, and in that event he bequeathed to his wife or to her trustees fully paid-up shares in the said limited company of the nominal value of £5000, and in the like event he bequeathed to *William Wright Thomson* fully paid-up shares in the said limited company of the like nominal value of £5000.

The testator, by a codicil to his will, dated the 11th of March, 1871, after reciting that he had sold the *Wandle Felt Company* to a joint stock company, called *Ralph Radcliffe Whitehead & Brothers, Limited*, revoked all the clauses of his will relating to the *Wandle Felt Company*, and bequeathed to his wife fifty shares in *Ralph Radcliffe Whitehead & Brothers, Limited*, and gave *William Wright Thomson* fifty other shares in the same company.

The testator died on the 31st of March, 1871. About three months after his death the *Ralph Radcliffe Whitehead & Brothers Company* paid a dividend for the then past year.

The suit having been instituted for the administration of the testator's estate by the widow, who was one of the executors, the

question arose whether the dividend was apportionable as between the estate and the specific legatees.

Mr. *Glasse*, Q.C., and Mr. *Waller*, for the Plaintiff, did not argue the question of apportionment.

Mr. *Higgins*, Q.C., and Mr. *Oswald*, for the other specific legatee, *William Wright Thomson*:—

The *Apportionment Act* of 1870 does not apply to shares of a limited company: *Jones* v. *Ogle* (1).

Mr. *Cotton*, Q.C., and Mr. *Bagshawe*, for some of the residuary legatees:—

Jones v. *Ogle* was the case of a mere private partnership and does not govern the present question.

Mr. *Pearson*, Q.C., and Mr. *Bunting*, for the trustees.

Mr. *Dunning*, Mr. *Romer*, and Mr. *Holmes*, for other parties.

SIR R. MALINS, V.C.:—

I think that a specific legacy is not within the *Apportionment Act* of 1870, and the dividend cannot be apportioned.

Solicitors: Messrs. *Johnson & Weatheralls*; Messrs. *E. J. Sydney & Son*.

(1) Law Rep. 8 Ch. 192.

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CASTLE *v.* GILLETT.

[1871 C. 93.]

Legacy—Charge on Real Estate—Specific Devise—Residue.

12 L.D. 165, 8

A testator, after giving certain pecuniary legacies, devised as follows: "As to all my messuages, farms, and lands at *Naunton*, consisting of about 180 acres, my stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of my estate and effects, real and personal, I bequeath and devise the same unto my said wife to hold unto my said wife until my youngest child shall attain twenty-one years," with limitations over in favour of the children:—

Held, that the pecuniary legacies were not charged on the farm at *Naunton*, or on the residuary real estate.

not followed Grey v. Stevens, 12 L.D. 162

JOHN GILLETT, by his will, dated the 13th of November, 1868, after making some specific bequests, gave a legacy of £200 to his wife, and directed that the sum of £1000 should be invested by her upon such securities as she should think proper, and that she should receive the interest thereof during her life for her own use, and at her death the testator gave the said sum of £1000 to his three sons, whom he there named. The will then proceeded as follows: "And as to all my messuages, farms, and lands at *Naunton*, consisting of about 180 acres, my stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of my estate and effects, real and personal, I bequeath and devise the same unto my said wife, as to estates vested in me upon trust or by way of mortgage, upon the trusts and subject to the equities affecting the same respectively, and as to all other my estate and effects to hold unto my said wife until my youngest child shall attain twenty-one years."

The testator then declared certain trusts of the estate so devised and bequeathed, which were in effect for the benefit of all his children equally.

The testator's personal estate was quite insufficient to pay in full the legacies of £200 and £1000. He left a small amount of real estate besides the farm specifically mentioned.

The testator died on the 30th of July, 1869, and his will was

proved by his widow on the 5th of January, 1871, and the bill, which was for administration, was filed by her administrator against the children.

The question was, whether the legacies were charged on the real estate.

Mr. *Speed*, for the Plaintiff, took no part in the argument.

Mr. *Bunting*, for the legatees of the £1000:—

The testator has made the real estate which he has expressly mentioned, and his residuary real and personal estate, one fund, and that is sufficient to charge them with his pecuniary legacies: *Bench* v. *Biles* (1). It is an important fact that the legacies were given previously to the gift of the real estate: *Francis* v. *Clemow* (2).

Mr. *J. W. Chitty*, for the children who did not share in the legacy of £1000:—

The question is whether there is a gift of the real estate as residue. The farm at *Naunton* is specifically devised, together with any real and personal estate the testator might have, only upon a special trust. There is no blending of the real and personal estate into one mass, as in *Greville* v. *Browne* (3).

This is not really a residuary gift at all, and the mere use of the word "residue" does not make it such: *Springett* v. *Jennings* (4).

SIR R. MALINS, V.C.:—

I think, on the whole, that this will does not charge the pecuniary legacies on the real estate. [His Honour then stated the effect of the will, and continued:—]

There can be no question that where a testator has not otherwise directed, his personal estate must first of all be applied to the payment of his legacies, and where a general residuary fund is constituted, the legacies must be taken out of the estate before it can be ascertained of what it consists.

(1) 4 Madd. 187.
(2) Kay, 435.
(3) 7 H. L. C. 689.
(4) Law Rep. 6 Ch. 333.

V.-C. M. 1873 CASTLE v. GILLETT.

But here the testator gives the farm at *Naunton* specifically, and then he adds, "and all the residue of my estate and effects, real and personal." And when one thing is specifically mentioned, and the residue is afterwards referred to, it is evident that the testator does not intend to treat what is specifically mentioned as part of such residue. Therefore I hold that the legacies are not charged on the farm at *Naunton*.

Then the residuary real estate is put on the same footing, and it follows that it is also not charged. *Francis* v. *Clemow* (1) is relied upon on behalf of the legatees, but I think it quite the other way. There the real estate was given by general words in a lump with the personalty, subject only to a gift of a partial interest in a certain portion. That is not the case here, and I think that the circumstance of the real estate going to the same objects as the residuary personalty does not affect the construction.

I think, therefore, that no part of the real estate is charged with the legacies.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland.*

V.-C. M. 1873 July 31.

In re TADDY'S SETTLED ESTATES.

Settled Estates Act—Interim Investment—Cash under the control of the Court.

The purchase-money of land sold under the *Settled Estates Act* is cash under the control of the Court, and may be invested as such.

In re Boyd's Settled Estate (2) not followed.

THIS was a Petition under the *Leases and Sales of Settled Estates Act*, seeking for a sale of certain settled property.

The minutes of the order as originally drawn provided for the interim investment of the purchase-money "in or upon any stocks, funds, or securities in or upon which cash under the control of the Court may be invested."

In consequence, however, of the decision of the Lord Chancellor,

(1) Kay, 435. (2) L. C. for M. R. June 2, 1873.

sitting for the Master of the Rolls, on the 2nd of June, 1873, in *In re Boyd's Settled Estate*, in which His Lordship followed *In re Shaw's Settled Estates* (1), and held that such purchase-moneys are not cash under the control of the Court, the trustees of the settlement had altered the clause providing for interim investment by substituting for the above-mentioned words the words "in Exchequer Bills or in Three per Centum Consolidated Bank Annuities."

Mr. *Glasse*, Q.C., and Mr. *Bromehead*, for the Petitioners, applied to have the minutes restored to their original form.

Mr. *Cotton*, Q.C., Mr. *Bristowe*, Q.C., Mr. *Macnaghten*, Mr. *Kekewich*, and Mr. *Herbert Lake*, appeared for the other parties.

SIR R. MALINS, V.C.:—

I adhere to my own decisions on this question. I consider that I am bound to regard the Lord Chancellor when sitting for the Master of the Rolls simply as if he were the Master of the Rolls, and only as a Judge of first instance.

Now it appears from the reported cases that the Master of the Rolls has first held that such purchase-moneys are cash under the control of the Court, and has subsequently decided the opposite way. I have always treated it as cash under the control of the Court, and I adhere to my previous decisions. I should be very sorry to see any disposition to narrow the construction of the Act under which the power of investment has been extended.

Solicitors: Messrs. *Lake & Co.*; Messrs. *Cookson, Wainewright, & Pennington.*

(1) Law Rep. 14 Eq. 9.

(1) See 21 W.R. 667: W.N. (1873) 113.

V.-C. M.
1873
July 7.

COOTE *v.* WHITTINGTON.

County Court Appeal—Administrator de son Tort—Suit to administer Estate —No Personal Representative.

Where a person possesses himself of the assets of a testator or of an intestate without having administered, a bill for an account, to the extent of the specific assets he has received, will lie against him as executor *de son tort*, though there is no legal personal representative.

Rayner v. *Koehler* (1) adhered to.
Cary v. *Hills* (2) dissented from.

THIS was an appeal from a decision of the County Court Judge of the borough of *Southwark*.

The plaint stated that *William Whittington*, manure manufacturer and merchant, now deceased, was at the time of his death justly indebted to the Plaintiff in the sum of £14, for costs due to the Plaintiff as an attorney; that *William Whittington* died on the 21st of August, 1872, intestate, leaving the Defendant, *Ann Whittington*, his widow; that he was, at the time of his death, indebted to divers other persons besides the Plaintiff; that he left assets of considerable amount and far more than sufficient to pay the sum due to the Plaintiff, and such assets consisted, amongst other things, of a stock of fish manure of the value of £200 or more.

The Defendant *Ann Whittington* had never taken out administration to the estate and effects of *William Whittington*, but she had possessed herself of his assets, or some part thereof, of considerable amount; and particularly she possessed herself of eighty tons of fish manure, and consigned the same through the Defendant *Samuel Cox* to the Defendant *William Hodgson*, whereby the Defendants became, in their own wrong, administrators of the said *William Whittington*, deceased.

The Plaintiff had applied to all the Defendants for payment of the money due to him as a creditor of *William Whittington*; but the Defendants had not paid the same.

William Whittington, during his life, was in the habit of selling his manures to *W. Hodgson* through the agency of *Samuel Cox*.

(1) Law Rep. 14 Eq. 262. (2) Law Rep. 15 Eq. 79.

The aforesaid eighty tons of manure were disposed of by *Ann Whittington* to *William Hodgson* through the Defendant *Samuel Cox*, with full knowledge that such manure formed part of the assets of *William Whittington*.

Ann Whittington had in her possession, or within her control, other assets of the intestate, which she threatened to, and would, dispose of without regard to the rights of the Plaintiff and other unsatisfied creditors of *William Whittington*, unless restrained from so doing by the order and injunction of this Court.

The Defendants refused to account to the Plaintiff for the assets of the intestate already disposed of by them as aforesaid, or for any further assets of his. There was a further sum due to the Plaintiff in addition to his former debt of £14.

The whole of the real and personal estate of *William Whittington* did not exceed in value the sum of £500.

The plaint prayed that an account might be taken of the real and personal estate of *William Whittington*, deceased, and that the same might be administered under the decree of this Court; that the Defendants, their agents, servants, and others might be restrained by injunction from selling, disposing of, or otherwise parting with possession of the personal estate and effects of *William Whittington*, deceased, and that a receiver of such personal estate and effects might be appointed; that the Defendants might be ordered to account for such part of the assets of *William Whittington*, deceased, as had come to the hands of them or either of them, and for their or either of their disposition thereof; and that they might be ordered to pay and make good to the Plaintiff and the other unsatisfied creditors of *William Whittington*, out of their own moneys, the value of the assets of *William Whittington* come to their hands and disposed of by them, and also the costs of this suit, including the costs of any proceedings for obtaining letters of administration to the estate and effects of *William Whittington*; and for such further relief as the Court should think fit.

No written statement was filed by the Defendants in answer to this plaint.

The case came on for hearing on the 21st of February, 1873, when a preliminary objection was made by all the Defendants, that no legal personal representative of the intestate, *William Whit-*

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tington, was a party to the suit. It was further objected, on behalf of the Defendants *S. Cox* and *W. Hodgson*, that no case for relief in equity against them, or either of them, was shewn by or alleged in the plaint, and that neither of the Defendants ought to have been made a party to the suit. The Plaintiff contended that the plaint was maintainable against all the Defendants, and, at all events, that the plaint was good as praying for the appointment of a receiver, and the Plaintiff asked for such appointment accordingly. The Judge reserved his decision upon these objections and adjourned the hearing.

At the date of the filing of the plaint, and up to the time of this first hearing on the 21st of February, 1873, no letters of administration had been taken out to the intestate's estate by any one; but on the 11th of March, 1873, letters of administration to the personal estate and effects of *William Whittington* were granted to the Plaintiff as a creditor of the intestate.

The adjourned hearing of the suit was on the 14th of March, 1873, when the Plaintiff put in evidence the said letters of administration, and applied to the Judge for leave to amend the plaint by adding a statement of the grant of administration, and striking out the allegation and prayer as to the real estates.

The Judge gave judgment on the objections raised by the Defendants *Samuel Cox* and *William Hodgson*, and was of opinion that no case for relief in equity against them or either of them was shewn by, or alleged in, the plaint, and that the said Defendants ought not to have been made parties to the suit; and the Judge accordingly dismissed the plaint as against the Defendants *Samuel Cox* and *William Hodgson*, with costs to be paid by the Plaintiff personally.

The Plaintiff tendered evidence as against all the Defendants to prove the allegations contained in the plaint, but the Judge was of opinion that any proof of the allegations could not affect the Plaintiff's case as against the Defendants *Cox* and *Hodgson*, and could not affect his decision upon the said objections, which decision had been given upon the assumption that every statement and allegation in the plaint was true and according to the fact; and, accordingly, the Judge refused to admit any evidence as against the Defendants *Cox* and *Hodgson*.

The Defendant *Ann Whittington*, by her solicitor, then objected to any amendment of the plaint, alleging that the amendments asked for altered the whole complexion thereof, and urged that, in any event, such Defendant was entitled to her costs up to that day.

The Judge heard the evidence tendered by the Plaintiff against the Defendant *Ann Whittington*, and thereupon made a decretal order on the 14th of March, 1873, that the plaint be dismissed as against the Defendants *S. Cox* and *W. Hodgson*, with costs to be paid by the Plaintiff to the Defendants; and that on payment by the Plaintiff to the Defendant *Ann Whittington* of her costs of the suit up to and including the hearing on the 21st of February, 1873, the Plaintiff be at liberty to amend his plaint by striking out the words "real estate," and by inserting the following paragraph: "That on the 11th of March, 1873, letters of administration of all the personal estate and effects of the said *W. Whittington*, deceased, were granted to the Plaintiff as a creditor of the deceased, and the Plaintiff thereby became the proper legal personal representative of the deceased." And upon payment by the Plaintiff of such last-mentioned costs, and the plaint being so amended, it was further ordered that an account be taken of what was due to the Plaintiff and all other creditors of the deceased; an account of the funeral and testamentary expenses; an inquiry what part, if any, of the personal estate of the intestate had come to the hands of the Defendant *Ann Whittington*, or to the hands of any other person by her order or for her use; and an inquiry what parts of the personal estate of the deceased were outstanding or undisposed of.

The Plaintiff appealed from the decision of the County Court Judge, and alleged that the Judge wrongfully allowed the demurrer of the Defendants *Cox* and *Hodgson*, and wrongfully dismissed the plaint as against them with costs, whereas he ought to have overruled such demurrer. That the Judge wrongfully ordered the Plaintiff personally to pay the costs of the suit to the Defendant *A. Whittington* as the condition of allowing him to amend the plaint; whereas he ought to have made a decree without requiring any amendment of plaint, or imposing any condition on such amendment. That the Judge ought to have admitted the evidence

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tendered against the Defendants *Cox* and *Hodgson*, and given his decision on the merits, instead of rejecting such evidence and dismissing the plaint as against them with costs upon their demurrer.

Mr. *Cottrell*, for the Plaintiff:—

This is a creditor's suit filed by the Plaintiff. He was himself at the time of filing the plaint a creditor of the testator for £14. The plaint alleges that the Defendant *Ann Whittington* possessed herself of some of the assets of the testator. The preliminary objection put in by her is on the ground of there being no personal representative of the testator, therefore she must be held to admit the receipt of these assets, and must consequently be an executrix *de son tort*. The plaint alleges as against the other two Defendants, *Cox* and *Hodgson*, that they received from the widow a particular portion of the assets, namely, eighty tons of manure, worth £200, well knowing that it was part of the testator's assets. By their objection they admit this allegation, consequently they also are executors *de son tort*, and all three Defendants are liable to account to the extent of what they have received. The plaint was dismissed as against the last two Defendants, and leave was given to the Plaintiff to amend his plaint as against Mrs. *Whittington* by striking out the statement as to the realty, and by adding a statement that the Plaintiff had since taken out administration; but as this amendment was allowed only on condition that the Plaintiff should pay the costs of Mrs. *Whittington*, it comes to the same thing as allowing a demurrer. It is submitted that the County Court Judge was wrong on both points. The 43rd statute of *Elizabeth*, c. 8, was passed for the express purpose of making a person who has wrongfully received the assets of a deceased person account for such assets, and this case comes precisely within the statute. So thought Mr. Justice *Williams*, who, in his book on executors, alludes to a case like this. He says (1): "When a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable not only to an action by a rightful executor or administrator, but also to be sued as executor by a creditor of the deceased or by a legatee;" and he refers to *Godolphin* (2), and

(1) 3rd Ed. p. 186.

(2) Pl. 2. cap. 8, s. 2.

also to *Webster* v. *Webster* (1). The same principle was followed in *Carmichael* v. *Carmichael* (2), where Lord *Cottenham* said, "An executor *de son tort* is subject to all the liabilities, but entitled to none of the privileges, of an ordinary executor." The case of *Rayner* v. *Koehler* (3) is an express authority in favour of the Plaintiff, for there the bill was filed by a creditor against the widow of a testator, alleging that she had taken out administration, and that she was the only legal personal representative, and had taken possession of all the real and personal estate of the deceased. The widow pleaded that she was not administratrix or legal personal representative, and it was held by this Court that if she was not administratrix she was executrix *de son tort*, and the bill could be maintained against her.

Mr. *Caldecott*, for the Defendant *Ann Whittington*:—

This is not a case which is intended to be brought within the statute of 43 Eliz. c. 8, for the preamble does not appear to point in any way to executors *de son tort*. It is this: "Forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means do take deeds of gifts and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors, for lack of knowledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts."

It has been often decided that you cannot have a bill filed by a creditor for the administration of an estate unless you bring before the Court a legal personal representative properly constituted. A

(1) 10 Ves. 93. (2) 2 Ph. 101.
(3) Law Rep. 14 Eq. 262.

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creditor has no remedy except against the administrator, and this remedy may always be obtained by compelling some one to administer, or by administering himself, as this Plaintiff afterwards did. If he had administered at first, the plaint would have been useless, since he might have recovered the debts by action of trover. In *Creasor* v. *Robinson* (1), where a suit was instituted by a creditor of an intestate against an administrator *de son tort* for an account and payment, the Master of the Rolls held that it was necessary to have a legal personal representative duly constituted before the Court. And in *Penny* v. *Watts* (2), on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the Defendant, who was the husband of the deceased executrix, it was held that a personal representative was a necessary party to the suit. In *Carmichael* v. *Carmichael* (3) a personal representative was before the Court, and was sued jointly with the executor *de son tort;* that case, therefore, does not apply. But you cannot go against the executor *de son tort* only, without having the personal representative. In a suit of this nature a duly constituted executor is a necessary party. It is true that your Honour's decision in *Rayner* v. *Koehler* (4) is opposed to this view; but it is right to point out to the Court that this decision has not been concurred in, for in *Cary* v. *Hills* (5), since decided, the Master of the Rolls said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the Court; if you were able to do so you would work great injustice. If, at the hearing of an administration suit, the Court finds that it has not the legal personal representative of the testator before it, then its arm is paralysed, and it can do nothing . . . It is true that the bill alleges that the Defendant has possessed himself of some part of the personal estate; but if he had possessed himself of every penny, that would not entitle the Plaintiff to relief." A plea on that ground was, therefore, allowed.

Mr. *Robinson*, for the Defendant *Wm. Hodgson*:—

This Defendant is in a different position from Mrs. *Whittington;*

(1) 14 Beav. 589.
(2) 2 Ph. 149.
(3) 2 Ph. 101.
(4) Law Rep. 14 Eq. 262.
(5) Law Rep. 15 Eq. 79, 82.

he is made a Defendant on the ground that he purchased the manure which had belonged to the testator; but suppose he did do so, that is no ground for filing a bill against him. There is no allegation that he did not pay *Cox* the value of the manure; on the contrary, the inference to be drawn from the statements in the bill is, that he did pay for it. The allegation is, "that the eighty tons of manure were disposed of by *Ann Whittington* to *Wm. Hodgson* through the Defendant *Samuel Cox*." If the manure was disposed of, that is as much as to allege that it was paid for, and the consequence would be that the money was received by *Samuel Cox*, and if so, it might have been, and probably was, handed over to Mrs. *Whittington*, but that does not create any further liability in *Hodgson*. He had been in the habit of purchasing manure from *Cox*, who was a commission agent, and was agent for many other persons besides the testator. It was of no consequence to him from whom the manure originally came, and it is not usually the custom of agents to give the names of their principals. He therefore purchased the manure from *Cox* in the ordinary way of business, and it is not even alleged that he did not pay for it. There is no case whatever against Mr. *Hodgson*. There is no charge which he was bound to answer, and his only right course was to demur to the bill, and that demurrer was very properly allowed with costs by the County Court Judge.

The Defendant *Samuel Cox* appeared in person, and submitted that his case was the same as that of the Defendant Mr. *Hodgson*.

Mr. *Cottrell*, in reply:—

The relief we ask is limited to that particular portion of the testator's assets which consisted of eighty tons of manure, and we have a right to follow those assets into the hands of the persons who received them. We allege that the manure was disposed of by *Cox* to *Hodgson* with the full knowledge on their parts that they formed part of the assets of the testator. It is no answer for either *Cox* or *Hodgson* to say that they bought innocently, without notice of the facts, as the *onus* was upon them to satisfy themselves that the person of whom they bought had a right to sell, and it is clear that Mrs. *Whittington*, never being the true owner of the

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goods, had no right or power to sell, and if she wrongfully sold, then *Cox* and *Hodgson* have their remedy at law by action against her to recover back the purchase-money.

We are justified, therefore, in making them Defendants to the suit, and asking for an account against them. As to the widow of the testator, it is admitted by the demurrer that she possessed herself of some of the assets, and it was her duty, as a matter of course, to take out administration, but by not doing so she compelled the Plaintiff to file a bill to obtain payment of the debt due to him. It would be a great injustice if, because the widow did not choose to administer, the Plaintiff should be deprived of his right to make her account for the assets which she has wrongfully received.

SIR R. MALINS, V.C.:—

No evidence has been filed by the Defendants in answer to this plaint, and no demurrer in form was put in, but it is admitted that the Defendants demurred *ore tenus*, that is to say, they appeared in Court and said, "Taking every word in the plaint to be true, you have still no right to a decree against us." That is the view which was taken by the learned County Court Judge. What I have now to decide is, whether he was right in dismissing the plaint as he did, because it is absolutely dismissed against two of the Defendants, *Cox* and *Hodgson*, and it is also in effect dismissed against *Ann Whittington*, except that as against her, the demurrer being allowed, there is liberty to amend by stating that the Plaintiff is legal personal representative of the intestate, and that amendment has been made accordingly, because, after the argument before the learned Judge, and before he gave judgment, administration had been taken out by the Plaintiff.

This case certainly involves considerations of the highest possible importance in the administration of justice, because it has been argued before me that, however clearly it may appear that a person, who has not taken out letters of administration to a person who has died intestate, or who has not proved the will of a person who has died testate, may have possessed himself of the assets of the testator or intestate to any amount whatever, no bill can be sustained in this Court, and therefore, certainly, not by a plaint in the County Court, for an account of the assets, by a person who

has not become legal personal representative. From that argument I entirely dissent.

I had occasion to consider the subject very recently—in the month of July last year—in the case of *Rayner* v. *Koehler* (1). That was a case which very plainly brought out the point. It was argued by very able and experienced counsel, who appeared in support of a plea. My decision has not been appealed against, and my recollection of the case is, that, if the counsel who argued the case had entertained any reasonable hope of success, they would have appealed it. The case was shortly this:—A bill was filed by *Ellen Rayner* on behalf of herself and other creditors. The bill alleged that Mrs. *Koehler* had administered to the estate of her husband, and received all the assets. She put in a plea. Now a plea admits the truth of everything which is not covered by the plea. She pleaded that she had not administered. The bill alleged that she had received assets, and inasmuch as the plea did not cover that point, there was an admission by her that she had received the assets, although there was a denial that she was the legal personal representative. Now, the case having been argued, I expressed myself thus (2): "On the face of this bill, if the allegations are true, and upon this plea they must be taken to be true, there is nothing more certain than that the Plaintiff is entitled to the decree asked. The Defendant, by her plea, must admit all the statements in the bill except such as she denies by the plea; therefore she admits that she has received and entered into possession and enjoyment of all the real and personal estate and effects of *Lewis Koehler*, and, consequently, she must have in her hands the only property by means of which the debt due to the Plaintiff can be paid. It is clear that a person who takes possession of the property of a testator and proceeds to deal with it must be treated as an executor *de son tort*, and can be sued in that character; therefore, it is quite clear that, if I allow the plea, I must give leave to amend. The Defendant states by her plea that she is not, and never was, the administratrix, and that she is not the legal personal representative; but the bill alleges that she has possessed herself of the estate of the testator, and, therefore, if she is not administratrix

(1) Law Rep. 14 Eq. 262. (2) Law Rep. 14 Eq. 265.

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she is at any rate executrix *de son tort*, and in that character the bill can be sustained. I think therefore that the proper course will be to direct that the plea shall stand for an answer, with liberty to the Plaintiff to except. As to the cases cited, I do not find anything in them which is contrary to my view of this case. There is one part of *Cooke* v. *Gittings* (1), as to not giving leave to amend, which I certainly could not follow; and I think the principle of my decision is supported by the case of *Vickers* v. *Bell* (2)." Now I read that as a recent decision, not because it was my own decision, but because it has not been followed, it is said, by a more recent decision of the Master of the Rolls. The Master of the Rolls having decided a case of *Cary* v. *Hills* (3), and that case having been cited to him, the reporters have inserted in the head-note "*Rayner* v. *Koehler* (4) not followed." Finding that in a head-note, I expected at least that the Master of the Rolls would have given some reason why he did not follow it. Possibly it escaped his notice altogether, and he did not even know of it, and from what I know of the Master of the Rolls, I think that if he had intended to dissent from me he would at least have paid me the respect of stating the ground of his dissent when I had so explicitly decided this case in the month of July preceding. No notice appears to have been taken of it however. Therefore I cannot regard the Master of the Rolls as deciding contrary to me, and even if he had, I am sure I should feel constrained, with the most perfect respect, to decide in accordance with my own decision in *Rayner* v. *Koehler*. Now, there being this conflict of opinion, I must look at the principle of the case. What, then, is the principle? It originates so long ago as a statute of Queen *Elizabeth*. In the course of the argument, Mr. *Caldecott* drew my attention to the recitals of the 43 of Eliz. c. 8, and no doubt the recitals would rather appear to make the object of the enactment more narrow than the enactment itself is. But I must go by the enactment of the statute, and it is this: "Be it enacted by the authority of this present parliament, that every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person

(1) 21 Beav. 497.
(2) 4 D. J. & S. 274.
(3) Law Rep. 15 Eq. 79.
(4) Ibid. 14 Eq. 262.

dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts or near thereabouts (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate at the time of his decease), shall be charged and chargeable as executor of his own wrong"—that is the origin of what we call *executor de son tort*—"and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts, upon good consideration without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

Nothing can be more clear, therefore, than the enactment of the statute that a person who unlawfully possesses himself of the assets of an intestate is liable to account as executor *de son tort*.

Now, what is the principle on which this Court has said that an executor *de son tort* can be sued for an account? There is a decision of Lord *Eldon* which we may always refer to with perfect satisfaction, although it seems to have been overlooked in modern cases. It is in *Webster* v. *Webster* (1). This is it: Plea of the *Statute of Limitations* by an executor, the testator having died in 1786, though probate was not taken until 1802, allowed; the allegation of the bill, upon a fair construction, being, that the Defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort* previously to 1792. In that case Lord *Eldon* thus expressed himself: "The Lord Chancellor admitted he might be charged as executor *de son tort* if it was proved that he had done any act." What does he mean by "charged"? Why, charged by a decree of this Court. That is all he means; that was the only thing before him. "The Lord Chancellor admitted that he might be charged as executor *de son tort* if it was proved that he had done any act, and thought the plea good upon the circumstances stated in the bill, considering

(1) 10 Ves. 93.

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the allegation upon a fair construction to be that the Defendant had possessed himself of the estate and effects of this testator previously to 1792; and if so, an action might have been brought at the moment; and consequently, not only a cause of action, but an opportunity of suing, arose in 1792." He does not mean to restrict him to bringing an action. If he could be sued in an action, he could be sued in this Court.

In the present case the creditor is a creditor for a small amount —only £14. The assets of the testator are said to be about £200. It would not have justified the creditor, to recover a debt of £14, to hold the entire assets, amounting to £200; and therefore justice requires that the parties should be liable to account for the assets in a suit in this Court, which is the only Court which could properly deal with the assets.

Now, is there any authority against this? In *Carmichael* v. *Carmichael* (1) Lord *Cottenham* lays it down expressly, and says that does not discharge him from liability to account. That is a case in which the legal personal representative was a party to the suit and also the executor *de son tort*. If there is any ground for the argument of Mr. *Caldecott*, the bill ought at once to have been dismissed against the executor *de son tort*, because he says you cannot maintain a bill against him. But Lord *Cottenham* retained the bill, and he says: "That is not an uncommon practice where the account is alleged to have been settled between the Plaintiff and Defendant; but have you any authority for it in the case of an alleged settlement of account between co-Defendants? I also want to know how you distinguish this case from one in which there are two executors, and one dies, and his representative accounts for his receipts with the survivor. That does not discharge him from liability to account in a suit for the administration of the estate; and the authorities shew that an executor *de son tort* cannot say he is so as against those who charge him as executor. He has all the liabilities, but none of the privileges, that belong to that character." Now, how can he have all the liabilities of the executor unless he is liable to that which an executor is liable to, namely, to have a bill filed against him for an account? There is a case of *Hill* v. *Curtis* (2), in which Vice-Chancellor *Wood*

(1) 2 Ph. 101. (2) Law Rep. 1 Eq. 90.

states his dissent from that *dictum* of Lord *Cottenham;* and if Vice-Chancellor *Wood* was at liberty to express his dissent from it, I am at liberty to express my assent to it; for it is one which is founded, in my opinion, on common sense. Then I was referred to a case of *Penny* v. *Watts* (1), which is stated also to be an authority that you cannot sue an executor *de son tort.* I quite agree that if you file a bill against an executor *de son tort* for a general account, you cannot sustain it. He is executor *de son tort* if he has improperly received assets, and so far as you can state that he has received a particular asset he is liable, but not further. He is not liable to a general account unless he has received everything. In the case before me I considered that the executrix was liable to everything, because the bill asserted—which she did not deny—that she had received the whole of the assets of the testator. But in *Penny* v. *Watts* the Lord Chancellor allowed the demurrer for want of parties. If there was any such rule of this Court as that you could not sue an executor *de son tort* at all, the demurrer ought not merely to have been allowed for want of parties, but for want of equity. If there was a total want of equity to sue, the demurrer ought to have been allowed on that ground, and not on the ground of want of parties. But why was it allowed in that case? Why, because it was asserted that there was a want of a legal personal representative, and it was decided that you cannot go on in the absence of a legal personal representative. Therefore, so far from being an authority against the right to sue, it is an authority in favour of it.

In *Williams* on Executors (2), after a long disquisition of what does make an executor *de son tort,* it is said: "When a man has so acted as to become in law an executor *de son tort,* he thereby renders himself liable, not only to an action by a rightful executor or administrator, but also to be sued as executor by a creditor of the deceased or by a legatee." Now, "to be sued" means, not at law merely, but generally. Then there is a reference to *Godolphin* (3): "On this ground, in a case where the Defendant acted as executor, but did not take out probate until sixteen years after the testator's death, the Lord Chancellor *Eldon* allowed a plea of

(1) 2 Ph. 149. (2) 3rd Ed. p. 192.
(3) Pt. 2, cap. 8, s. 2.

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the *Statute of Limitations*, because he might have been sued as executor *de son tort*." That is the case of *Webster* v. *Webster* (1), to which I have just referred. But in the last edition Mr. Justice *Williams* adds: "For an executor *de son tort* has all the liabilities, although none of the privileges, which belong to the character of executor."

Therefore upon these authorities I cannot entertain the slightest doubt on the words of the statute of *Elizabeth*. The decision of Lord *Eldon* in *Webster* v. *Webster*, the passage in *Godolphin*, and every decision on them until we come down to the decision of the Master of the Rolls, are uniform, that where a person possesses himself of the assets of a testator or intestate without having administered he may be treated as executor *de son tort*, and that an executor *de son tort* has all the burthens, but not the privileges, of a regular executor; and it would be the height of injustice if a person could possess himself of the assets of the testator, and because he did not choose to clothe himself with the character of administrator, could not, therefore, be sued.

Mr. *Robinson* and Mr. *Caldecott* have said that there is a remedy, because you may compel somebody to administer; but while you are doing that the property may be lost. It is not the practice of this Court to appoint a receiver in every case. In many cases the appointment of a receiver would be a fallacious remedy. The property may be gone, you cannot get at it. Therefore the only way to get at it is to make the person who has received the assets liable for an account, just as if he had proved the will. In other words, it comes to this, a person cannot take advantage of his own wrong, and if he chooses to act as executor without clothing himself with that character, he must, as between himself and the creditors, be treated as occupying the character he has assumed.

I am very sorry, indeed, that the Master of the Rolls, when he decided, in a manner in which I am unable to concur, in *Cary* v. *Hills* (2), did not state his reason, or go into the authorities to shew that there was any such principle in this Court as would enable a man to act as an executor and yet not be accountable for the assets.

Now, applying that to the present case, what are the allegations?

(1) 10 Ves. 93. (2) Law Rep. 15 Eq. 79.

They are that the widow had received particular assets at all events—namely, this fish manure—to the extent of £200. The amount of the debts of the intestate does not appear. The Plaintiff sued for £14, and therefore, so far as appears on the face of this plaint, the executrix *de son tort* had received assets more than enough to pay this debt of the Plaintiff in full. There is more than that; an allegation that she, having received these assets, disposed of them by the instrumentality of the Defendant *Cox*, as the agent of the widow, to Mr. *Hodgson*. There is no allegation that they have paid the money. Mr. *Robinson* says that there ought to have been an allegation that they had not been paid for. I agree that it would have been better if it had been so; but, taking the whole of the plaint together, I consider it as amounting to this: Mrs. *Whittington*, the widow, has possessed herself of the assets to the extent of £200, and to that extent I am of opinion that she is clearly liable to account. She has parted with those assets to Mr. *Hodgson*. Have they been paid for? If not, the plaint alleges, in the fifth paragraph, that the Defendant *Ann Whittington* has never taken out administration to the estate and effects of the said *William Whittington*, but she has possessed herself of his assets, or some part thereof, of considerable amount, and particularly she possessed herself of eighty tons of fish manure, and consigned the same, through the above-named Defendant, *Samuel Cox*, to the above-named Defendant, *William Hodgson*, whereby the Defendants became, in their own wrong, administrators of the said *William Whittington*, deceased. To that there is a demurrer. Now they, therefore, admit that they had received them in their own wrong as executors of the said *William Whittington*. Mr. *Robinson* said that I cannot take the demurrer as an allegation of law; but it is an allegation of fact, namely, that these three persons have received the assets in their own wrong, which they could not do if they had been properly paid for.

Under these circumstances I think the case is established, and that a decree ought to be made for an account against the widow as executrix *de son tort*, and against the others as executors *de son tort*. I think the case was argued before the learned Judge in January last. He deferred his judgment until the month of February, and again until the month of March, and in the mean-

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time the Plaintiff in the suit had taken out administration. The learned Judge, under these circumstances, dismissed the plaint with costs against *Cox* and *Hodgson*, and although he did not in form dismiss it against the Defendant *Ann Whittington*, he gave her all the costs, which is the same as dismissing it, but he gave the Plaintiff leave to amend; still Mrs. *Whittington* gets her costs up to that time, which is the same as dismissing it against all the parties. I can have no hesitation in coming to the conclusion that that is wrong and must be reversed. I am of opinion that on the allegations in the plaint, which are not contradicted by a particle of evidence, because, on a demurrer, every allegation alleged in the plaint is admitted—there was enough alleged to call upon the Court to make a decree against them as executors *de son tort*, and to that extent, therefore, the order was wrong. Now what ought to have been done when he gave judgment, which was after administration was taken out? He ought to have allowed the plaint to be amended by stating the fact of administration and retaining these parties. There is no pretence that the Plaintiff is not a solvent man, and therefore complete justice would have been done by that form of decree, and will be now, because if it turns out that they have not received assets, the plaint will be dismissed against them; and if it turns out that they have received any assets which they have not accounted for, it is perfectly clear it would not be dismissed. The form of decree I suggest, therefore, will do them complete justice. With regard to the widow, nothing could, in my opinion, be more wrong than that the plaint should be dismissed against her with costs against the Plaintiff, when upon the allegation she must be taken to have received assets, and yet refused to administer, so that the Plaintiff has been obliged to take upon himself the responsibility of administering.

Under the circumstances, I must answer the questions submitted to me in this way: Whether or not the decree or decretal order was right as far as it ordered that the plaint should be dismissed as against *Cox* and *Hodgson* with costs? I answer, that it was not right to be dismissed. Whether or not the County Court Judge was right in giving leave to amend? that is involved in the first question; I think he was quite right in giving leave to amend:

"or in attaching the condition that the Plaintiff should personally pay the costs to the Defendant *Ann Whittington* up to the first hearing." I think he was wrong in that respect. The plaint as amended must stand; the decree must be reversed as far as regards costs. The decree will be amended as I have stated, and will then be in a proper form.

A discussion then took place as to the costs of the appeal.

Mr. *Robinson*:—I ask that the costs be made costs in the cause. We are brought here by a mistake of the County Court Judge.

Mr. *Cottrell*:—Your Honour has decided already, in *Ashby* v. *Sedgwick* (1), that those who succeed on these appeals must have their costs, since, as the amount in question is necessarily small, the costs of appeal would in many instances more than swallow up the amount in dispute.

SIR R. MALINS, V.C.:—

I think the justice of the case upon the subject of costs will be met by the Defendants paying the costs; but if the estate is a solvent one, then the costs will come out of the estate. The costs of all parties in the Court below will be costs in the cause.

Solicitor for the Plaintiff: Mr. *F. R. Coote.*

Solicitors for the Defendants: Messrs. *Ashley & Tee*; Messrs. *Hicklin & Washington.*

(1) Law Rep. 15 Eq. 245.

V.-C. M.
1873
July 19.

LANE *v.* GRAY.

[1873 L. 31.]

Practice—Affidavit of Documents—15 & 16 *Vict. c.* 86, *s.* 18—*Discretionary Power in the Court.*

In a suit by an alleged next of kin to an intestate, against the Solicitor to the Treasury, to whom administration had been granted :—

Held, that the Defendant was not bound to make an affidavit of documents until a *primâ facie* case had been made by the Plaintiff.

The order for production of documents is discretionary.

THIS was a suit instituted by the Plaintiff, claiming to be entitled to a share in the estate of *Maria Brown*, who died intestate in December, 1871, and whose estate had been administered by the Crown in default of any kin appearing to be entitled to her estate.

The Plaintiff alleged that she was one of the next of kin of the intestate in the seventh degree, through an ancestor who died in 1713.

This was an adjourned summons which had been taken out in Chambers calling upon the Defendant, the solicitor to the Treasury, to make the usual affidavit of documents.

Mr. *E. Ford*, in support of the summons :—

The Plaintiff has a right, under any circumstance, to call upon the Defendant to make an affidavit of documents. In *Rumbold* v. *Forteath* (1), which was a suit by the heir-at-law for discovery in aid of an action of ejectment brought by him against persons in possession claiming as devisees of the ancestor, it was held that the Defendants, whether bound to produce any documents or not, must at any rate make the usual affidavit in answer to a summons for production by the Plaintiff. The 18th section of 15 & 16 Vict. c. 86, makes it imperative on the Court to order this affidavit to be made. The words of the section are, "It shall be lawful for the Court, upon the application of the Plaintiff in any suit, . . . and whether the Defendant may or may not have been required to

(1) 3 K. & J. 44. 3 Jur. N.S. 659

answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any Defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit as the Court shall think right."

Mr. *Hemming*, for the Crown:—

The Plaintiff in this case does nothing more than allege that she is next of kin of the intestate; there is no evidence in support of her assertion; such cases as these are of frequent occurrence. The estates of intestates, to which the Solicitor to the Treasury has taken out administration, are frequently claimed by a number of persons, of whom many have no foundation whatever for their claims, but, by obtaining production of documents belonging to the intestate, information is obtained by means of which fresh fictitious cases have in many instances been manufactured. We do not impute any such improper purpose to the Plaintiff, of whom we know nothing, but it is submitted that in these cases something more than mere assertion should appear before the documents are disclosed, and that the Plaintiff should be required to shew by affidavit a *primâ facie* case. The 18th section of the 15 & 16 Vict. c. 86, does not make it imperative upon the Court to order production of documents. It merely empowers the Court to make an order for production if it shall think right; consequently, it is in the discretion of the Court to consent or not to this application.

SIR R. MALINS, V.C.:—

It seems there is in this intestacy a large amount of property involved, and it is easy for persons to come forward who have no sufficient grounds for their claims. The words of the section referred to are, "It shall be lawful for the Court to make an order for the production of such documents as the Court shall think right." I think, therefore, there is a discretionary power vested in the Court to order production when it shall appear to the Court to be right to do so. It seems just and reasonable that the Court should not order persons in possession of an estate to produce their documents of title to every one who may claim, and who, perhaps, may have no foundation for the claim.

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I think I am justified in refusing this application until the proceedings have been carried further and the Plaintiff has made out a *primâ facie* case in support of her claim. The summons will therefore be dismissed.

Solicitor for the Plaintiff: Mr. *J. T. A. Patrick.*
Solicitors for the Crown: Messrs. *Raven & Bradley.*

V.-C. M. 1873 Aug. 4.

BARON DE WORMS *v.* MELLIER.

[1873 W. 173.]

Injunction to restrain Action—Contract for Work—Architect's Certificate—Jurisdiction—Similar Defence at Law and in Equity.

The Defendants contracted to do certain work for the Plaintiff, which was to be subject to the approval of an architect, and no payment was to be made without his certificate. The Defendants demanded a larger sum than was certified by the architect, and brought an action for the amount. The Plaintiff filed his bill for an injunction to restrain the action:—

Held, that the Plaintiff could as well plead at law as in this Court that the architect's certificate was conclusive under the contract; and there was no equity to justify the bill.

Motion for an injunction refused.

THE bill stated that the Plaintiff, Baron *Henry de Worms*, arranged with the Defendants, Messrs. *Mellier & Durlacher*, for the execution of certain works in, and the supply by them of certain furniture to, his house, known as *South Lodge, Knightsbridge*, at the price of £1940 18*s.*, in fixing which sum the value of furniture to be supplied was included. The arrangement was reduced into the form of a written agreement, signed by both parties, and was dated the 31st of January, 1872. It provided that the work should be executed under the inspection of an architect therein named, and should be finished on or before the 1st of April, 1872, according to the specification, drawings, and estimate already prepared and signed by the parties, with such additions to, enlargement, and alteration of and deviations from the said works (if any) as the architect might from time to time during the progress of the works direct. The Plaintiff was to pay to the Defendants for the

full and perfect completion of this contract the sum of £1940 18*s.*, but if the architect should direct any additions to or omissions from the works, the value of such additions, omissions, or variations, was to be added to, or deducted from, the said sum as the case might be, and the Defendants were to obtain the architect's certificate in writing before they could obtain any instalment, and also to enable them to claim any balance due to them on completion of the works, and no instalment was to be paid without such certificate; and in all matters as to which the architect was entitled to exercise a discretion the decision of the architect was to be final and was not to be called in question or reviewed either during the execution or after the completion of the works; but in all matters in which the architect was not entitled to exercise a discretion every dispute arising between the parties was to be referred to a single arbitrator, and if the parties could not concur in the appointment of an arbitrator it was to be lawful for a Judge to appoint an arbitrator under the 12th section of the *Common Law Procedure Act*, 1854. Some variations had taken place during the execution of these works, and the Plaintiff alleged that the Defendants had not executed all the work in a satisfactory manner. The Plaintiff's architect, Mr. *Petit*, issued certificates under the contract for sums amounting in the whole to £1500, which were duly paid by the Plaintiff. On the 17th of June, 1873, the Defendants filed a bill in this Court against the Plaintiff in respect of the contract, alleging that there was a large sum due to them, that the accounts were complicated, and such as could not be properly taken in a Court of Law; that the architect was colluding with the Plaintiff and declined to issue his final certificate. The bill therefore prayed for an account of what was due to the Defendants under the contract and payment thereof accordingly.

On the 2nd of July, 1873, the architect signed and issued his final certificate, in which he decided that the Defendants were entitled to the sum of £1632 1*s.* 10*d.*, and no more, less the £1500 already paid, in full discharge of all claims. On the 17th of June, 1873, the Defendants commenced an action against the Plaintiff in the Common Pleas to recover the sum of £1362 18*s.* 2*d.*, which was stated to be the amount due to the Defendants under the contract. A correspondence then took place between the solicitors on

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each side, in which the Plaintiff's solicitors proposed to bring into Court in the Chancery suit the amount claimed by the Defendants in the action, and that all proceedings in the action should be stayed. This the Defendants' solicitors refused, alleging that the money claimed by the Defendants was in respect of different matters from those which formed the subject of the suit.

The Plaintiff insisted that all work done, and materials and things supplied, were included in the contract, and were to be paid for upon the terms thereby expressed, and that he never made any agreement with the Defendants for work or supply of materials otherwise than by the before-stated contract, and everything not specified in the contract had been done by the directions of Mr. *Petit*, as the architect appointed thereby.

The bill prayed that it might be declared that according to the true construction of the contract the works and things respecting which the action was brought were included in the contract, and ought to be paid for according to the terms thereof. And the bill prayed an injunction to restrain the action.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, now moved for the injunction:—

This is a case in which the Plaintiff has been harassed by the conduct of the Defendants. The contract entered into between the Plaintiff and the Defendants expressly provides that no portion of the money payable under the contract shall be received by the Defendants without the certificate of the architect. The architect's certificate is therefore binding, and must precede payment. Before the certificate was given for payment of the final instalment the Defendants filed a bill against the Plaintiff, alleging that the account could only be taken in a Court of Equity; and then, having obtained the architect's certificate, they brought an action for the recovery of a much larger sum than was certified to be due to them. The certificate was for £1632 1*s.* 10*d.*, and as they had received £1500 by previous instalments there would remain only £132 1*s.* 10*d.* due, which the Plaintiff is ready to pay, but the Defendants demand £1362 18*s.* 2*d.* beyond the £1500 they have received, and this they have no right to. We therefore ask that the action may be stayed, and that the question

may be settled in this Court on the footing of the contract. In the Court of Law the matter would be left to an arbitrator, and it would be a more expeditious mode of deciding the dispute by having the accounts taken, if accounts are necessary, in this Court, and the Defendants have themselves alleged this by their bill filed against the Plaintiff.

Mr. *Glasse*, Q.C., and Mr. *Phear*, for the Defendants, were not called upon.

SIR R. MALINS, V.C.:—

The case is, that the Plaintiff employed the Defendants to furnish and decorate his house, and a contract was entered into between the parties, under which it was provided that the Defendants were to obtain the architect's certificate in writing before they could obtain any instalment of the money payable under the contract, and also to enable them to claim any balance due to them upon the completion of the works, and no instalment was to be paid without such certificate.

It is clearly settled both at law and in equity that on such a contract the certificate of the architect must precede any recovery of the money due under the contract. It is true there have been cases where this principle has been departed from, but then it was proved that there had been either fraud or misconduct on the part of the architect, as in the case of *Pawley* v. *Turnbull* (1), where a bill was filed by a contractor alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, and who ousted the contractor and finished the building. Vice-Chancellor *Stuart* on proof of such unfair conduct decreed payment of the balance due to the Plaintiff on the contract, and declared the architect's decision not binding. And so, also, if there is proof of bias in the mind of the architect which would lead him to form an incorrect or unfair decision. That was the case in *Kemp* v. *Rose* (2), which occurred in relation to a building contract, and Vice-Chancellor *Stuart* there held that the existence of any circumstance calculated to bias the mind of an arbitrator unknown to either of the parties who had submitted to his decision,

(1) 3 Giff. 70. (2) 1 Giff. 258.

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was a sufficient ground for the interference of the Court, and the architect having given his decision under a bias the Court gave directions for ascertaining how much was justly due to the builder.

In this case I do not find any allegation of fraud or misconduct on the part of the architect. The Plaintiff says he wants to stop the action at law on the ground that this bill delivered by his tradesman is exorbitant, and he says he has the certificate of his architect which proves that a much smaller sum is the amount which is properly due. The action is brought to recover a larger amount than that which is stipulated in the contract, and the Plaintiff in equity has pleaded the general issue "never indebted." It appears to me that the proper course is for the Plaintiff to plead the contract; that the certificate of the architect is thereby made conclusive; and that the architect has certified for a certain amount, and then to pay that amount into Court.

There is no justification for bringing such a case into this Court. It is nothing more than an application to restrain the proceeding with an action for the recovery of an upholsterer's bill. The suit is devoid of equity, and the motion must be refused with costs.

Solicitors for the Plaintiff: Messrs. *Dawes & Son.*
Solicitors for the Defendants: Messrs. *Barnard & Co.*

In re STRANTON IRON AND STEEL COMPANY.

V.-C. B.
1873
July 26.

Company—Shareholder—Distribution of Shares in order to secure full Voting Powers—Refusal to register Transfers—Registration ordered—Companies Act, 1862, *s.* 35—*Companies Act*, 1867, *s.* 26.

The articles of association of a company provided that every member should have one vote for every share up to 100, one for every five shares in the next 100, and one for every ten shares after 200. The directors were empowered to decline to register any transfer of shares made by a member who was indebted to the company; or, in the case of shares not fully paid up, to a transferee of whom they did not approve.

Notices having been issued of a meeting at which would be proposed resolutions for winding up the company voluntarily, and for the appointment of a liquidator, the largest creditors of the company, who were also the holders of 1000 fully paid up shares, in order to secure full voting powers at the meeting, made nine transfers of 100 shares each to as many nominees of their own, and sent them in for registration; but the company refused to register the transfers.

On motion on behalf of the transferors under the 35th section of the *Companies Act*, 1862;

The company were ordered to register the transfers in time to enable the transferees to vote at the meeting.

MOTION.

This was a motion by special leave on behalf of the *Crédit Foncier of England, Limited*, that the *Stranton Iron and Steel Company, Limited*, by its directors or secretary, might be ordered to register the nine transfers of shares in the said company, the particulars of which were mentioned in a schedule to the notice of motion, into the names of the respective transferees named in the transfers.

The company was incorporated by registration on the 5th of December, 1871, with a memorandum and articles of association. Amongst the latter were the following:—

19. "The directors may decline to register any transfer of shares made by a member who is indebted to the company, or, in the case of shares not fully paid up, to a transferee of whom they do not approve."

55. "Every member shall have one vote for every share held

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by him up to 100; one for every five shares in the next 100; and one for every ten shares after 200."

The *Crédit Foncier* were the holders of 1000 fully paid-up shares in the company. They were not indebted to the company, but were their largest creditors, holding debentures of the company as a security for a debt due from the company to them of £19,000. The debentures were not yet due, and all interest on them had been paid.

On the 16th of July, 1873, notices signed by the secretary, by order of the board of directors, were issued, that an extraordinary general meeting of the company would be held on the 28th following, at which meeting resolutions (to be confirmed at a subsequent meeting) requiring the company to be wound up voluntarily and appointing a liquidator or liquidators—or an extraordinary resolution, to the effect that it had been proved to the satisfaction of the company that the company could not, by reason of their liabilities, continue their business, and that it was advisable to wind up the same, and appointing a liquidator or liquidators thereof—would be proposed.

On the 23rd of July the *Crédit Foncier* executed the nine transfer deeds above mentioned, in the form suggested by the articles of association, of 100 shares each to nine persons; and on the same day the deeds were left at the company's office for registration with the share certificates, and the fees were paid; but shortly afterwards the deeds were returned by the secretary with a verbal message, that under the circumstances he could not register the transfers. The transferees were the solicitor, and several clerks in the employ of the *Crédit Foncier*.

A correspondence followed, but registration was refused; and this motion was made on Saturday, the 26th of July, the meeting being summoned for the 28th. An affidavit by the secretary of the company, though not filed, was allowed to be read, in which he stated that the company was in a solvent condition.

Mr. *Kay*, Q.C., and Mr. *Jackson*, Q.C., for the motion:—

The only reason the company give for refusing to register is, that this meeting has been called. Under the 55th article the

Crédit Foncier would have only 200 votes. Then the question is, are they not entitled to distribute their shares in order to command full voting power at the meeting? We say they are so entitled: *Fraser* v. *Whalley* (1).

Under the Act of 1862 (sect. 22) the right of transferring shares is perfectly unfettered. A man has as free a right to transfer his share as to hand over a bank note: *Weston's Case* (2). The only limitation in the articles to the right of transfer is in the 19th article. But we are not indebted to the company, and the shares are fully paid.

That we are right in applying to the Court in this way under the 35th section of the Act appears from *Ex parte Penney* (3).

The 26th section of the Act of 1867 (30 & 31 Vict. c. 131), provides that a transfer shall be registered at the request of the transferor, in the same manner as if the application were made by the transferee.

Mr. *Swanston*, Q.C., for the company:—

The remedy given by the 35th section is discretionary in the Court, and is applied only where there has been unnecessary delay in registering. In this instance the transfers were lodged on the 23rd of July. The secretary himself had no authority to register; and probably until the board meeting, which would precede the extraordinary general meeting of the 28th of July, he would get no authority. It is ridiculous, therefore, to say that there has been unnecessary delay.

The *Crédit Foncier* are fully secured creditors. No doubt if the company were insolvent, and this were a creditors' liquidation, the fullest control ought to be given to the creditors. But the company here are solvent; it is a shareholders' liquidation; and it is inequitable that the *Crédit Foncier* should have absolute control over the meeting.

Under the 35th section the Court has the fullest power to decide upon the merits of an application upon equitable as well as upon legal grounds: *Ex parte Parker* (4). What then becomes of the argument that registration is the legal right of the trans-

(1) 2 H. & M. 10, 30.
(2) Law Rep. 6 Eq. 238; Ibid. 4 Ch. 20.
(3) Law Rep. 8 Ch. 446, 448.
(4) Ibid. 2 Ch. 685, 690.

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feror, *ex debito justitiæ?* In *Simpson's Case* (1) a motion under this section was refused without prejudice to the filing of a bill, the case being one of difficulty. The true test, it is submitted, is—Would the Court interfere by interlocutory injunction?

In *Williams' Case* (2) a transfer, made nominally for the market value of the shares, but actually without consideration, to a clerk of the transferor, described as a "public accountant," was set aside.

These transferees are mainly clerks in the employ of the *Crédit Foncier*, and the avowed object is to evade the 55th article of association, in order to control the meeting and command the appointment of the liquidator. The whole struggle is for the profits of the liquidation. This is plainly an unlawful purpose. Nothing was decided in *Fraser* v. *Whalley* (3) about the legality or illegality of splitting up of shares in order to manufacture votes. All that is now asked is, that, as upon interlocutory injunction, the Court will not alter the *status* of the parties.

Sir James Bacon, V.C.:—

7 Ch D 468

In my opinion I cannot refuse to make the order which is asked. The applicants are the owners of shares—a class of property of which one of the incidents is a right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register that transfer (except in the cases which have been referred to in this particular instance, and which do not occur here), or to furnish some reason for refusing to transfer.

Now has the secretary of the company in this case done his duty? No ground whatever has been assigned which will excuse non-registration, except a desire to exclude the applicants from the exercise of that which is their plain legal right.

I fully adopt the rule that was laid down in *Ex parte Parker* (4). I quite agree that I am not bound to follow common law rules exclusively; and that the effect of the 35th clause is to admit equitable principles into the decision of questions arising under it.

(1) Law Rep. 9 Eq. 91.
(2) Ibid. 225, n.
(3) 2 H. & M. 10, 30.
(4) Law Rep. 2 Ch. 685.

But where is there any plausible justification for directors saying that they will not register, on the ground that the result of registration will be to control the resolutions which are to be proposed at the meeting on Monday next—one of which is that this company is to be wound up—and that upon the affidavit of the secretary, who swears that the company is perfectly solvent? If that be true, what pretence is there for summoning this meeting at all? Into that, however, I do not propose to enter. No suggestion has been or could be made why these transfers should not be registered; but, adopting Mr. *Swanston's* own phrase, if I am at liberty to do so, that it is my duty to keep things *in statu quo*, I think that if I were not to enforce the registration of these transfers, I should certainly be altering the *status in quo* of this company.

I must therefore grant the application to have these shares presently registered, and registered before the meeting of Monday next.

Mr. *Swanston*:—That is more than they ask for by their notice of motion.

The VICE-CHANCELLOR:—I think it is no more than they are entitled to have. If the application be not granted in that shape, the sole object for which the transfers were made will be frustrated. My order, therefore, even if it be not asked for, is, that registration shall be made before the meeting is held on Monday next.

Mr. *Kay* asked for the costs of the motion.

The VICE-CHANCELLOR said he would give no costs.

Solicitor for the *Crédit Foncier*: Mr. *Frederick Heritage.*
Solicitors for the Company: Messrs. *Mackenzie, Trinder, & Co.*

V.-C. B.
1873
July 31.

PLEWS *v.* BAKER.

[1873 P. 116.]

Partnership—Arbitration Clause—Common Law Procedure Act, 1854, *s.* 11.

19 Eq 563.
SCLD. 29
32-4.

In 1868 *C.* was admitted by purchase into partnership with *A.* and *B.*, a firm of solicitors, for a term of fifteen years. It was provided by the Articles that if at any time any dispute or difference of opinion should arise between the partners relative to any clause, matter, or thing therein contained, or to the conduct of any of the partners, or upon any other point whatever, the same should be referred to arbitration.

On the 17th of June, 1873, *A.* and *B.* served *C.* with notice, alleging that he had committed divers breaches of the articles, and in particular had neglected to keep proper accounts and to make proper entries of business, and declaring the partnership dissolved and determined from the date of serving the notice, under a power contained in the Articles.

C. refused to admit the validity of this notice of dissolution, and told his partners that he should submit the question of the validity of the notice to arbitration. On the 1st of July *A.* and *B.* filed their bill for a partnership account on the footing of a dissolution from the time of serving the notice, and on the same day *C.* served them with notice requiring them to refer to arbitration all questions that had arisen relative to the notice of dissolution :—

Held, on motion by *C.*, that he was entitled to an order staying proceedings in the suit, pursuant to the *Common Law Procedure Act*, 1854, in order that the questions as to the validity of the notice of dissolution might be determined by arbitration.

MOTION on behalf of the Defendant to stay all further proceedings in the suit, pursuant to the *Common Law Procedure Act*, 1854, s. 11.

Early in 1868, the Defendant *Baker* was introduced to the firm of *Lawrance, Plews, & Boyer*, solicitors, and on the 4th of May in that year he was taken into their offices to make himself acquainted with the regular course of their business, before any terms of partnership were agreed upon.

On the 11th of July, 1868, articles of partnership were executed between *Lawrance, Plews, Boyer*, and the Defendant *Baker*, by which, upon certain terms therein specified, including payment of £5000 by way of premium and for the purchase of two-eighteenths of the business, *Baker* was admitted as a partner for a term of fifteen years, the shares of the profits being, during the lifetime of

Lawrance, divisible in the proportion of seven-eighteenths to *Lawrance*, seven-eighteenths to *Plews*, and two-eighteenths to each of the remaining partners (*Boyer* and *Baker*), and after the death of *Lawrance* (which happened on the 1st of July, 1871), in the proportion of seven-elevenths to *Plews*, and two-elevenths to *Boyer* and *Baker* respectively.

It was provided (Art. 17) that "the partners respectively shall from time to time, during the continuance of the partnership, enter into proper books to be provided for that purpose a true, plain, and full account of all business done, and of all moneys which shall be received or paid on account of debts due to and from the partnership, and of all such other matters, transactions, and things whatsoever as ought to be entered in the usual and regular course of business of attorneys and solicitors, with such circumstances of names, dates, times, and places as may be necessary to explain the same, and enable bills of costs to be made out therefrom at any time, and that all such books, and all bills, bonds, and securities, and all drafts, accounts, deeds, documents, letters, evidences, papers, and writings whatsoever, relating to the partnership or to the business thereof, shall be kept at the office, and that each of the partners shall have at all times, as well during the continuance of the partnership as after the determination thereof, otherwise than by death of any of the partners, and until the matters relative thereto shall be wound up and closed, free liberty and access to inspect, examine, transcribe, and copy out the same, or any part thereof, at his will and pleasure, without any hindrance or denial whatsoever by the others of them, and in case of the death of any of the partners, his representatives shall in like manner, at all reasonable times, be at liberty to peruse and take copies of the same.

Art. 25 provided that if, contrary to the agreement hereinbefore contained, any of the partners should, to the detriment or injury of the partnership business, neglect or refuse to employ himself diligently therein, unless prevented by illness or other sufficient cause, or should wilfully neglect or refuse to keep proper and just accounts, or to make proper entries of all business done, or should apply to his own private use moneys or property of the partnership, or do other specified acts, or execute any deed for the benefit of

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his creditors, or present any petition for adjudication of bankruptcy, or do, commit, or permit to be done, any act whatsoever by means of which the said parties, or the moneys or effects of the partnership, or the profits thereof, should or might be charged, attached, or in any manner prejudiced or affected, "then and in any of the said cases the others, or either of the other partners, if they or he shall think fit, shall be at liberty to dissolve the partnership by giving to the partner who shall so offend in any of the particulars aforesaid, or leaving at his dwelling-house or place of abode, or by affixing on some conspicuous place in the office of the partnership, a notice in writing declaring the partnership to be dissolved and determined, and the partnership shall, from the time of giving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly, without prejudice, nevertheless, to the remedies of the respective partners for the breach or non-performance of all or any of the covenants herein contained, at any time before the determination of the partnership."

Art. 27 provided that the death of any partner should not operate as a dissolution of the partnership as to the other partners, or vary the terms and conditions thereof as between such other partners, except as therein expressly mentioned.

Art. 29. "If at any time hereafter it shall be thought by any of the partners, or by his counsel in the law, being of the degree of a barrister, that these presents, or any of the covenants or stipulations herein contained, are or is in any respect defective, or not sufficiently clear to explain the intention of the partners, they the said partners shall and will, at their joint expense, or at the expense of the party requiring the same, if the same shall be for his own private satisfaction only, execute such further deed or deeds, or other writings, as may be expedient for remedying such defect."

Art. 30. "If at any time hereafter any dispute or difference of opinion shall arise between the partners, or in case of the difference of any of the partners between the surviving partners or partner and the representatives of the deceased partners or partner relative to any clause, matter, or thing herein contained, or to the conduct of any of the partners, or upon any other point whatsoever, the same shall be referred to the arbitration of two indifferent persons, one to be named by each of the partners, and in case of difference of

opinion between such arbitrators, then by any third person to be by such two arbitrators named; and if any of the partners shall neglect or refuse to name an arbitrator within fourteen days next after he shall have been thereunto required by the others or other of them, the subject of difference shall be referred by the partners or partner making the requisition to the arbitration of two indifferent persons to be by him or them alone named, and in case of differences between them, by any third person to be by two such persons named"—with a provision for the appointment of an umpire by the Attorney or Solicitor-General in case the arbitrators could not agree as to the appointment. The partners thereby agreed to obey the award in all things, and that the submission should be made a rule of the Court of Queen's Bench—and "further, that if any action, suit, or other proceeding be commenced by any of the partners against the others or other of them who shall have made such request for a reference as aforesaid, such request may be pleaded in bar to any such suit, action, or proceeding."

Lawrance died on the 1st of July, 1871.

The case made by the bill was, that shortly after Defendant was admitted into partnership he failed to make proper entries of the business transacted by him, and in 1869 and 1870 entries which ought to have been made daily by him were allowed to fall greatly into arrear. Remonstrances were made, and his attention was called to the articles of partnership in this respect by leaving on his desk a copy of Articles 17 and 25. In January, 1873, *Plews* and *Boyer* had an interview with him, in which they called his attention to the irregularities, and, as the bill alleged—but this was denied by Defendant, who stated that it was not until June, 1873 (a few days before receiving the notice of dissolution), that he had any intimation that the Plaintiffs intended to treat his alleged irregularity in making entries (which had arisen from pressure of business) as a ground for dissolving partnership—gave him distinct verbal notice that they could not permit such a state of things to continue, and that unless it was amended Plaintiffs would avail themselves of the powers given to them by the articles of partnership. On the 17th of June Plaintiffs served Defendant with a notice in writing, by which, after reciting Articles 17, 25, and 27, the death of *Lawrance*, and that *Baker* had "committed divers breaches of the said

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articles of partnership, and had not used his best endeavours to promote and advance the interest and profits of the said partnership, and in particular, and in breach of the said articles, and to the detriment and injury of the said partnership business, you have wilfully neglected to keep proper and just accounts, and to make proper entries of all business done"—and although repeatedly requested to keep proper accounts and make proper entries, had, subsequently to such request, wilfully committed such breaches, and neglected to make a true, plain, and full account of all business done, and of all moneys which had been paid by him on account of the partnership, and of all such other matters, transactions, and things as ought to be entered in the usual and regular course of business of attorneys and solicitors, with such matters, as in the 17th article mentioned, as were necessary to explain the same, and on various days had omitted to make any proper entries of payments out of moneys of the partnership—they (the Plaintiffs), pursuant to and in exercise of the power given by Art. 25, did by such notice, by clause 25, declare the partnership "to be dissolved and determined from the time of giving or leaving or affixing this notice as provided by the said 25th clause." By virtue of this notice, as the bill alleged, the partnership was dissolved and determined on the 17th of June, 1873.

The Defendant refused to admit the validity of the notice of dissolution, and denied that he had been wilfully irregular in making his entries, or that there had been any breach of the articles on his part such as to justify Plaintiffs in giving notice of dissolution. In conversations with *Plews*, one of the Plaintiffs, in which Defendant stated that he did not admit the validity of the notice to dissolve, or that a dissolution had been effected, *Plews* replied that he quite understood that; that their respective positions were not changed, and that what took place was without prejudice to their rights. After some discussion and attempt at negotiation, in the course of which Plaintiffs refused to accept the offer of Defendant to submit the matter to arbitration, or to refund any part of the money paid by Defendant for his share of the business, Plaintiffs on the 1st of July filed their bill, praying a declaration that the partnership constituted by the articles of the 11th of July, 1868, was determined and dissolved by the notice of the

17th of June, 1873, or that it might be dissolved by decree; the usual partnership accounts; and a receiver.

On the same day Defendant served Plaintiffs with notice that their notice of dissolution was invalid, and insisting that the partnership was not dissolved or determined, and requiring to be referred to arbitration, under the indenture, all disputes and differences of opinion that had arisen between them relative to the said notice and consequential thereon; an arbitrator on his part being named in the notice.

Defendant now moved to stay all proceedings in the suit, pursuant to the *Common Law Procedure Act*, 1854.

Plaintiffs also moved for the appointment of a receiver.

Mr. *Amphlett*, Q.C., and Mr. *Marten*, in support of the Defendant's motion:—

The case made by the bill is within the arbitration clause, and "if parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament (*Common Law Procedure Act*, 1854, s. 11) was passed a *primâ facie* duty is cast upon the Courts to act upon such an agreement": *Willesford* v. *Watson* (1); and—unless the Judge shall be satisfied that there is sufficient reason for not referring—to enforce such a provision: *Wickham* v. *Harding* (2). The jurisdiction given by sect. 11 has been constantly exercised by Courts of Common Law, even when the question to be referred was one of law: *Randegger* v. *Holmes* (3); *Seligmann* v. *Le Boutillier* (4); *Russell* v. *Pellegrini* (5); and *Willesford* v. *Watson* is a precedent for such an order in a Court of Equity. *Witt* v. *Corcoran* (6) (before this Court on the 12th of June, 1871), in which the proceedings of the Defendant in the arbitration, of which he had given notice, were restrained, was decided, not on the general principle, but on the ground that the conduct of the Defendant was contrary to good faith. Upon the merits, we say that without the consent of the Defendant the attempted dissolution was not

(1) Law Rep. 8 Ch. 473, 480; Ibid. 14 Eq. 572.
(2) 28 L. J. (Ex.) 215.
(3) Law Rep. 1 C. P. 679.
(4) Ibid. 681.
(5) 6 E. & B. 1020.
(6) Law Rep. 8 Ch. 476, n.

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effectual: *Allhusen* v. *Borries* (1); and even where the articles of partnership contain a power of expulsion such power must be exercised with good faith and not arbitrarily, so as to enable the continuing partners to appropriate to themselves the share of the expelled partner at less than its real value: *Blisset* v. *Daniel* (2).

Upon the merits we further submit that irregularity or delay in keeping the entries did not justify the Plaintiffs in arbitrarily giving notice of dissolution. The Defendant has stated his willingness to dissolve upon fair terms, but the negotiations for an amicable arrangement of the matters in difference between them were entirely without prejudice to the rights of either of them existing at the time of the service of the notice of dissolution.

Mr. *Locock Webb* (Mr. *Kay*, Q.C., with him), for the Plaintiffs:—

The issue raised by the bill does not come within the scope of the arbitration clause. Under the articles of partnership, no power is given to the arbitrator to determine upon the validity of the notice of dissolution or anything but matters of merely internal arrangement arising upon the construction of the articles themselves. Section 11 of the *Common Law Procedure Act*, 1854, is not imperative, and does not apply to a case where, as we say, the Defendant has broken through the articles: *Cook* v. *Catchpole* (3); and, under that section, the ordinary jurisdiction of the Court is not ousted by an agreement to refer, even though followed by the appointment of arbitrators: *Cooke* v. *Cooke* (4); *Witt* v. *Corcoran* (5). Upon the merits we contend that there has been a clear breach of the articles such as to justify the Plaintiffs in giving notice of dissolution; that the effect of that notice was to dissolve the partnership, and that after the negotiations which followed such notice as to the terms upon which the Defendant was to retire, it is not open to him to submit to arbitration the question of the validity of the notice of dissolution.

The motion for a receiver was not opposed by the Defendant.

(1) 15 W. R. 739.
(2) 10 Hare, 493. 18 Jur. 122
(3) 13 W. R. 42. 10 Jur. N.S. 16
(4) Law Rep. 4 Eq. 77.
(5) Law Rep. 8 Ch. 476, n.

SIR JAMES BACON, V.C.:—

The *Common Law Procedure Act*, 1854, s. 11, has been the subject of repeated decisions, and none more pointed than that of *Willesford* v. *Watson* (1)—not that I think the Act of Parliament contains anything ambiguous in its terms or questionable in its policy, because both of them, in my opinion, are perfectly distinct. When this Act of Parliament was passed it was thought that when parties who were competent had entered into a deliberate agreement that their differences should be referred to arbitration, they ought to be bound by the bargain they had entered into, and should not appeal to any other tribunal than that which they had themselves chosen for the purpose of settling their differences. In *Witt* v. *Corcoran* (2), as far as I recollect it, there had been quarrels between the partners: one of them chose to say the partnership was dissolved, and was advertising that fact extensively; the other partner, who denied that there had been any such dissolution, and who felt that his trade was being injured and his property affected by the conduct of the Defendant, filed his bill to restrain the publication and circulation of those advertisements, and thereupon the Defendant bethought himself that by giving notice of arbitration he would stop the proceeding in that cause. He tried it, and in my judgment he failed, and I restrained him from making in that suit an unjust use against his partner of the *Common Law Procedure Act*. My belief is, that that decision was perfectly right, and in no way conflicting with *Willesford* v. *Watson*. [His Honour, after referring to sect. 11, continued:—] In this case, a partnership having been established, one of the stipulations was that if at any time thereafter any dispute or difference of opinion should arise relative to any clause, matter, or thing therein contained, or to the conduct of any of the partners, or upon any other point whatsoever, the same should be referred. Then clause 17 provides, that the partners shall respectively from time to time during the continuance of the partnership enter into proper books to be provided for that purpose a true, plain, and full account of all business done, and so on. Upon that a dispute and difference arises between the parties. The Plaintiffs allege that the Defendant has neglected his duty as a

(1) Law Rep. 8 Ch. 473; Ibid. 14 Eq. 572. (2) Law Rep. 8 Ch. 476, n.

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partner, and then, under another clause, they say that the right has accrued to them to put an end to the partnership by reason of his conduct, and by reason of his not having faithfully performed the 17th clause of the partnership articles. Nothing can come more plainly, in my judgment, within the terms of the stipulation as to arbitration, and the terms of the Act of Parliament which provides for what shall be the consequences of an agreement to refer. I have listened for hours together to statements on the part of the Plaintiffs and answers on the part of the Defendant as to his alleged infringement of that 17th clause. The Plaintiffs say that he has infringed it; he denies that he has done so. I will not go into that matter. If I did there would be a good deal to say, perhaps, on both sides. I find that there has been no great inconvenience sustained by this partnership by reason of the Defendant's alleged misconduct; nevertheless he may have brought himself within the terms of the 17th clause, and whether he has or not I have not to decide, but that will be decided by the arbitration. On the 17th of June, notice is given by the Plaintiffs to determine the partnership; that notice is disputed the moment it is given, and has been disputed from that time to this by the Defendant, and over and over again there is abundant proof in the evidence that the Defendant has never acquiesced in that notice for dissolution, has always protested against it, has always insisted that whatever was done by or between himself and his partners was done under protest by him and upon an assurance, not contradicted, that all that took place should be without prejudice. [His Honour referred to the Defendant's affidavit, describing the interview with *Plews* on the 25th of June, 1873, in which, after stating that he had determined to submit the question of the validity of the notice to arbitration, the Defendant again asked *Plews* to reconsider his decision to dissolve the partnership. "The said *Thomas Plews* spoke in a kindly manner, and said he would further consider the matter, but must consult the said *R. Boyer*, and that as he (the said *Thomas Plews*) was leaving town on that day until the following Monday, matters must remain *in statu quo* until his return. The said *Thomas Plews* also said the *status* was that the partnership was dissolved, but I said I did not admit that there was a dissolution, and the said *Thomas Plews* said he quite understood

that, and that our respective positions were not changed, and that what took place was without prejudice to our rights, or words to that effect." His Honour continued:—] Without referring further to those parts of the affidavit in which he says that he had then prepared the notices (which he afterwards served), calling on the Plaintiffs to submit to arbitration, the Defendant, in my opinion, has brought himself within the protection of the *Common Law Procedure Act*, which by this notice of motion he seeks to invoke, and he is entitled to have these matters of difference between himself and his partners, the matters of conduct, their ground of complaint under the 17th clause or any other clause, now referred in the terms of the statute. The passage I have read remains uncontradicted on this evidence. It has been argued that however all that may be the Defendant is estopped by what has been done since the notice. I cannot join in that conclusion. I do not think he has done anything that has not been positively forced on him; I do not think he has done anything that was not necessary for his own protection to prevent injury to his partners and injury to his clients, and even if it had been stronger than it is, I think that expression, "without prejudice," once pronounced and never withdrawn, is an answer to anything that can be said on the subject.

The Defendant not objecting, the Plaintiff *Plews*, the senior partner, would be appointed receiver. All further proceedings in the suit to be stayed, except for the purpose of giving effect to the order appointing the receiver, with liberty to apply.

Solicitors: Messrs. *Lawrance, Plews, & Boyer;* Messrs. *Lake & Co.*

V.-C. B.

1873

Aug. 2.

Ex parte RECTOR OF CLAYPOLE.

Railway Company—Re-investment of Purchase-money for Glebe—Improvements and Additions to Parsonage House—Lands Clauses Act, 1845, *s.* 69.

The purchase-money for glebe lands taken by a railway company may, with the consent of the bishop and patron, be applied towards the expenses of improvements of and additions to the rectory house.

Form of Order.

Petition.

The *Great Northern Railway Company* having, under their statutory powers, taken part of the glebe lands belonging to the Rectory of the North Mediety of *Claypole*, in the County of *Lincoln*, a sum of £360, being £260 for the purchase of the land, and £100 as compensation for severance, was paid by the company into Court, and by an order dated the 15th of June, 1857, made on the petition of the then rector, the sum was ordered to be invested and placed to the account of the North Mediety of the Rectory, and the interest of the stock was ordered to be paid to the rector and his successors.

The present rector, the Rev. *C. P. Plumptre*, who was inducted on the 22nd of April, 1863, having entered into a provisional contract with a builder for the execution of certain additions to and improvements of the parsonage house for the sum of £568, subject to the sanction of the contract by the Court, now presented this Petition, stating that the parsonage required additions and improvement, and that it was desirable that the sum of £390 15*s.* 5*d.* stock (representing the £360) should be sold, and the proceeds, with other moneys, laid out in the additions and improvements; also that the bishop of the diocese and the patron of the living were consenting to the application.

The Petition prayed that the Petitioner might be at liberty to improve and make additions to the parsonage in the manner specified in the provisional contract, and that upon the completion of such improvements and additions being certified the stock might be sold and the proceeds paid to the Petitioner, he undertaking duly to apply the same; and that the company might be ordered

to pay the Petitioner his costs of and incident to the Petition, and the proceedings thereon, and the application of the proceeds of sale of the stock in the improvements and additions aforesaid.

Mr. *Kay*, Q.C., and Mr. *Waller*, for the Petitioner:—

Instances in which the Court has allowed purchase-money to be re-invested in or towards the cost of erecting new buildings are: *In re Wight's Devised Estate* (1); *In re Davis' Estate* (2); *In re Incumbent of Whitfield* (3); *Re Dummer's Will* (4); *In re Leigh's Estate* (5); and of repairing old ones: *In re Davis' Estate; In re Buckinghamshire Railway Company* (6).

In this instance the Rectory will be permanently benefited by the voluntary outlay upon the house by the Petitioner of the further sum of £200.

The VICE-CHANCELLOR:—Suppose the next rector should say, "I am perfectly satisfied with such a house as this was before the so-called improvements and the additions were made, and should like to have the interest of the money that has been laid out."

Mr. *Kay*:—No doubt it is a matter for the discretion of the Court. But there is ample jurisdiction; for if the Court can build, it can add to, and, *à fortiori*, can improve, existing buildings.

Mr. *T. Stevens*, for the railway company.

SIR JAMES BACON, V.C., made the order as prayed, with the exception that the money was ordered to be paid to the bishop's secretary, his name and address being inserted in the order; and directed the costs to be paid according to the Act.

Solicitors: Mr. *J. W. Hickin;* Messrs. *Johnson, Farquhar, & Leech.*

(1) 6 W. R. 718.
(2) 3 De G. & J. 144.
(3) 1 J. & H. 610.
(4) 2 D. J. & S. 515.
(5) Law Rep. 6 Ch. 887.
(6) 14 Jur. 1065.

V.-C. B.
1873
Aug. 1.

RAINE *v.* WILSON.

[1873 R. 86.]

Practice—Substituted Service—Lunatic Defendant not so found by Inquisition.

Substituted service of copy of bill allowed on the medical officer of the asylum in which a Defendant of unsound mind, but not so found by inquisition, had been placed, on an affidavit that the medical officer refused to allow any person to see the Defendant or to serve him with legal papers.

MR. CALDECOTT moved for leave to effect service of copy bill on the Defendant, who was a person of unsound mind not found so by inquisition, on an affidavit stating that the medical officer of *Hanwell Lunatic Asylum*, where the Defendant had been placed, positively refused to allow any person to see the Defendant or serve him with legal papers. He referred to *Anonymous* (1), in which case Vice-Chancellor *Wood* had refused, under the circumstances, to allow substituted service on the medical officer of a lunatic asylum.

The VICE-CHANCELLOR allowed substituted service on the medical officer of the asylum.

Solicitors: Messrs. *Shum, Crossman, & Crossman.*

(1) 2 Jur. (N.S.) 324.

In re BIEL'S ESTATE.
GRAY *v.* WARNER.

V.-C. W.
1873
June 25.

[1872 B. 239.]

Will—Bequest of Legacies and of Residue—Direction that Funeral and Testamentary Expenses be paid by Legatees—Exoneration of Residue—Grant by one Executor of Annuity to co-Executor invalid—Burden of Proof—Costs of Suit.

M. B. bequeathed £1000 to *E. D. B.* (a natural son of her sister deceased, and one of her executors), and legacies to other persons. By codicil *M. B.*, after stating that her intention was to give to *T. W.*, the other executor, the residue of her estate, after payment of the legacies, free of all deductions in respect of probate duty or on any other account, declared that all the legatees should contribute rateably towards the payment of her funeral and testamentary expenses in exoneration of the residue :—

Held, that the costs of the suit for the administration of *M. B.'s* estate must be paid out of the residue.

T. W., who had received all the assets, agreed, in consideration of £700, part of the legacy of £1000, to grant an annuity to his co-executor, *E. D. B.*, whose life he knew was a bad one :—

Held, that the onus was upon *T. W.* to prove that the transaction was a fair one, and that as he had not done so the agreement was invalid.

MARIA BIEL, who died on the 22nd of July, 1871, by will dated the 14th of April, 1870, bequeathed a legacy of £1000 to *E. D. Biel* (a natural son of a sister deceased), and numerous legacies to other persons named. By a codicil, dated the 20th of May, 1870, after stating that it was her intention by her will to give her cousin, *Thomas Warner*, the residue of her estate, after paying the legacies, free of all deductions in respect of probate duty, or on any other account, declared her will to be that all the legatees named in the will should contribute rateably in proportion to the amount of their legacies to her funeral and testamentary expenses in full exoneration of the residue of her estate by her will given to her cousin *Thomas Warner*, and that the legacies should be abated or diminished accordingly, so as to produce a fund to discharge such funeral or testamentary expenses. The testatrix appointed *E. D. Biel* and *Thomas Warner* trustees and executors of her will. *E. D. Biel* did not receive any of the

V.-C. W. 1873 *In re* BIEL'S ESTATE. GRAY *v.* WARNER.

testatrix's estate. *Thomas Warner*, who survived *E. D. Biel*, received such estate, and the Chief Clerk certified that he had in his hands a balance of £1684 2*s.* 11*d.* *E. D. Biel* having died intestate, letters of administration were granted to Mr. *Gray*, solicitor to the treasury, for the use of Her Majesty, and he, by summons, instituted a suit for the administration of his estate.

By a memorandum of agreement, dated the 26th of August, 1871, *Thomas Warner* agreed to grant to *E. D. Biel* an annuity of £48, payable during his life quarterly, the first quarterly payment to be made on the 29th of September, 1872; in consideration of which *E. D. Biel* agreed to pay *Thomas Warner* the sum of £700, being part of the legacy of £1000 to which he was entitled under the will of *Maria Biel*, the same to be paid within one year from the date of the memorandum of agreement. The annuity to be secured by the bond of *Thomas Warner*. *E. D. Biel* died on the 4th of January, 1872, at the age of forty-nine years. The Chief Clerk disallowed the £700 in the accounts brought in by *Thomas Warner*. The testatrix's property consisted almost entirely of money, which she had many years ago deposited in the hands of *Thomas Warner*, and the repayment of it was secured by his bond dated the 28th of May, 1858. Payments were made by *Thomas Warner* to *E. D. Biel* in respect of the legacy of £1000. The main object of the suit was to try the validity of the transaction in reference to the annuity. The evidence shewed that the life of *E. D. Biel* was a bad one, he having been a person of intemperate habits; that the contract had never been completed by the giving of a bond to secure the annuity; that *E. D. Biel* died before the time stipulated for making the first quarterly payment of the annuity had arrived; and that £671 would have purchased a government annuity of £48. The evidence on the part of *Thomas Warner* was that *E. D. Biel* was fully acquainted with all the circumstances; and that he, after a full consideration of them, desired *Thomas Warner* to grant him an annuity. The case was adjourned into Court on the questions arising upon the certificate.

There was evidence by *Warner* and by his brother, a solicitor, who drew the agreement, that the transaction was fair; that *E. D. Biel* himself preferred *Warner's* personal security to a Government annuity, and was fully informed in every particular.

Mr. *Hemming*, for the Plaintiff, said that two questions arose in this case: first, whether, on the true construction of the codicil, the costs of the suit formed part of the funeral and testamentary expenses which the testatrix directed that her legatees should contribute rateably in exoneration of the residue of her estate; which, he submitted, must be answered in the negative: *Morgan* and *Davey* on Costs (1); and, secondly, whether the memorandum of agreement was a complete and binding contract upon the estate of *E. D. Biel;* and he contended that, considering all the circumstances of the case, the agreement was invalid and ought to be set aside; and that the costs of the suit must be paid by the legatees in proportion to the amount of their legacies.

Mr. *J. W. Chitty*, for the Defendant, contended that *E. D. Biel* and *Thomas Warner* were dealing with each other on equal terms; that the former was not in the hands of the latter; and that there was no fiduciary relation at all on the part of *Warner*.

[The VICE-CHANCELLOR:—He was dealing with his *cestui que trust*, and he purchased from a legatee at an undervalue, which upon the authorities it is clear he could not do.]

The purchaser was himself an executor, and he was as much master of the assets as *Warner* was. It might be difficult to explain why the Court should look with jealousy upon dealings of this kind, but to set aside this agreement would be to extend the doctrine of the Court further than it had been applied. That doctrine proceeded upon this, that a trustee had power or mastery over the person with whom he was dealing, but that could not be the case where both were masters. *Biel* and *Warner* had equal dominion over the fund dealt with, and there was no influence exercised by the latter over the former; both possessed full knowledge as regarded the value of the annuity; the transaction was a fair one; the annuity was not unduly or improperly granted; and it was a case in which the Court would, if it had been called upon, have made a decree for specific performance of the agreement; therefore it ought not now, because the annuitant had died, to be held invalid. The statements of *Warner* are corroborated by his

(1) Page 115.

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In re BIBL'S ESTATE.

GRAY v. WARNER.

brother, and a man ought not to be in a worse position because the person with whom he dealt is dead.

[The VICE-CHANCELLOR:—But he is so. The Court has constantly refused to enforce a claim resting solely on the statement of the claimant of an alleged agreement between himself and a dead man. Corroboration is required, and the corroboration here is not of the best kind.]

He also submitted that, on the construction of the language of the codicil, it included not only the testamentary expenses, but the costs of the suit.

[He cited *Coles* v. *Trecothick* (1); *Jackson* v. *Lever* (2); *Mortimer* v. *Capper* (3); and Lord *St. Leonards'* Vendors and Purchasers (4).]

SIR JOHN WICKENS, V.C.:—

There is some difficulty in this case, in consequence of the form of the codicil in reference to contribution by the legatees for the testamentary expenses. I think the safer way, however, will be to hold that the testamentary expenses to be paid by the legatees are the ordinary testamentary expenses, and not the costs of the suit. As to the other and principal point, it seems to me that it is governed by the decision in *Luff* v. *Lord* (5). If a trustee purchases from a *cestui que trust* he takes upon himself the onus of proving the fairness of the transaction, and I cannot see that *Warner* was relieved from that burden because his *cestui que trust* was also his co-executor. It is quite clear that *Warner* had possession of the property during the lifetime of the testatrix, and that he had after her death the unlimited confidence of his co-executor. He knew all about the testatrix and his co-executor and the property, and he proved the will; and there is nothing in the case to induce me to hold that he could purchase from the legatee without taking upon himself the onus of establishing that the transaction was a fair one. The onus was not shifted by the fact that there was an agreement. In all these cases there are agreements. Then comes the question, Has *Warner* sufficiently

(1) 9 Ves. 234–248.
(2) 3 Bro. C. C. 604.
(3) 1 Bro. C. C. 156.
(4) 14th Ed. p. 294.
(5) 34 Beav. 220.

shewn that the transaction was a *bonâ fide* one? In my opinion it was fundamentally an unfair one. He purchased at an undervalue from a person who, he knew, was not able to protect himself, for at times he was incompetent, and whose life was a bad one. I therefore hold that the agreement is invalid; and that the money, if no arrangement be come to, must be paid into Court. It must be ascertained what proportion of the testamentary expenses each legatee has to pay.

Solicitors: Messrs. *Raven & Bradley;* Messrs. *Newman, Dale, & Stretton.*

GILLAM *v.* TAYLOR.

[1871 G. 76.]

Charity—Perpetuity—Gift to Descendants as they may need—Solicitor and Client—Costs—Attorney-General.

A testator gave the residue of his real and personal estate to trustees for investment in Government securities in their joint names, and directed the interest from time to time to be given to such of the lineal descendants of *R. W.* as they might severally need; and the trustees were to make provision for ensuring a continuance of the trust at their decease:—

Held, that the gift was charitable.

Attorney-General v. *Price* (1) followed, *Liley* v. *Hey* (2) commented upon.

THE Rev. *R. T. W. Taylor*, who died on the 12th of December, 1870, by will executed on the previous day, after directing the payment of all his debts, funeral and testamentary expenses, and giving to certain persons and charities specific and pecuniary legacies, gave all the residue and remainder of all his real and personal estate to trustees, in trust, "to be invested in Government securities in their joint names, the interest of which shall from time to time be given to such of the lineal descendants of *Richard Wilson*, my dearest mother's brother, as they may severally need, and the said trustees of this fund shall make such provision as will ensure a continuance of the said trust at their decease." The suit, instituted in May, 1871, was for the administration of the tes-

(1) 17 Ves. 371. (2) 1 Hare, 580.

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tator's estate, and it now came on to be heard upon further consideration. The Chief Clerk had certified that there were sixty of such descendants of *Richard Wilson*. The principal question was, whether the gift of residue was a charitable one or not.

Mr. *Greene*, Q.C., and Mr. *Jolliffe*, for the Plaintiffs, the trustees, stated the facts of the case, and cited *Bernal* v. *Bernal* (1).

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the heir-at-law and next of kin, contended that the gift to lineal descendants was not exclusively to poor descendants, and was not a charity; that the gift, upon the construction of the language of the will, might not take effect till twenty-one years after the testator's death, and was void as a perpetuity; and that if a charity, so far as the realty and the impure personalty were concerned, the gift was void.

[They cited *Dunnage* v. *White* (2), *Cruwys* v. *Colman* (3), and *Grant* v. *Lynam* (4).]

Mr. *Dickinson*, Q.C., and Mr. *Stallard*, for the descendants:—

The gift here is not open to the objection that there is uncertainty in the objects, nor that it tends to a perpetuity, because it is not a gift to poor. It is not a charity in any sense of the word, but if it be considered by the Court that there is uncertainty, or that it tends to a perpetuity, then it is submitted that there is a charity, and that there must be a scheme. But it should be remembered that a gift to persons according to their need is not a gift to needy persons. The words of the will are, "as they may severally need," or, in other words, in such proportions as they may need. That is private benevolence, and if so it is not charity. The cases of *White* v. *White* (5), *Attorney-General* v. *Price* (6), and *Attorney-General* v. *Sidney Sussex College* (7), will probably be cited, but not one of them applies to this case; but the decision in *Liley* v. *Hey* (8) is conclusive that this is a gift in trust for indi-

(1) 3 My. & Cr. 559.
(2) 1 Jac. & W. 583.
(3) 9 Ves. 319.
(4) 4 Russ. 292.
(5) 7 Ves. 423.
(6) 17 Ves. 371.
(7) Law Rep. 4 Ch. 722.
(8) 1 Hare, 580.

viduals—lineal descendants—who take a life interest in the entire income. [They also cited *Fordyce* v. *Bridges* (1), *Leake* v. *Robinson* (2), and *Barnes* v. *Patch* (3).]

[The VICE-CHANCELLOR referred to the case of *Chapman* v. *Brown* (4).]

The construction contended for on behalf of the descendants is a reasonable and not unnatural one, unless it be considered that the gift of the rents and profits is a gift of the *corpus* itself, but that not being so the descendants are entitled to the income.

Mr. *Eddis*, Q.C., and Mr. *H. Smith*, for an annuitant and descendant in the same interest, referred to the case of *Peek* v. *Peek* (5), and contended that the property was distributable amongst those who represented the lineal descendants, or the lineal descendants in tail.

Mr. *Hemming*, for the Attorney-General:—

On the authorities of *White* v. *White* (6), where a legacy for putting out poor relations was supported as a charity, *Isaac* v. *De Friez* (7), where a bequest to the testator's own and his wife's poorest relations at the discretion of the executors was considered as a charity, *Attorney-General* v. *Price* (8), which is substantially on all fours with the present case, and *Bernal* v. *Bernal* (9), it is clear that a gift to poor relations is a good charity, and I submit that this gift to those descendants who may be in need of assistance is a good gift to poor relations.

[He also referred to *Attorney-General* v. *Sidney Sussex College* (10), and to *Jarman* on Wills (11), and distinguished *Liley* v. *Hey* (12) from this case, as the names of the legatees were there given.]

Mr. *Dickinson*, in reply.

(1) 10 Beav. 90.
(2) 2 Mer. 363.
(3) 8 Ves. 604.
(4) 6 Ibid. 404.
(5) 17 W. R. 1059.
(6) 7 Ves. 423.
(7) Amb. 595; 17 Ves. 373, n.
(8) 17 Ves. 371.
(9) 3 My. & Cr. 559.
(10) Law Rep. 4 Ch. 722.
(11) 3rd Ed. vol. ii. p. 113.
(12) 1 Hare, 580.

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SIR JOHN WICKENS, V.C.:—

I have, though unwillingly, come to the conclusion that I am bound by the case of *Attorney-General* v. *Price* (1), and *Isaac* v. *De Friez* (2), and that I must treat this as a charitable gift. It is remarkable that those cases were not cited before Vice-Chancellor *Wigram*, who decided the case of *Liley* v. *Hey* (3), and that of course detracts from that decision. The true rule in all these cases is to do what Sir *William Grant* did in the case of *Attorney-General* v. *Price*, to ascertain as far as possible what was the true intention of the testator, and I adopt Sir *W. Grant's* words. After referring to the case of *Isaac* v. *De Friez*, he said (4): "This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance in favour of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations." No doubt the word "poor" occurred in that case. The language is: "It is amongst my poor kinsmen and kinswomen, and amongst their offspring and issue." And in the case of *Isaac* v. *De Friez* the testator's bequest was unto his own and his wife's poorest relations, at the discretion of the executors; not abstractedly poor, but to be divided equally amongst such persons as the executors considered to be the poorest relations. Every one of them might have £10,000 a year, but some might have £20,000 a year, and those who had £10,000 a year would take it. Still it was held to be a charity. The words here seem to me to import, beyond all question, the creation of a perpetual fund or institution, in which no person or persons is or are to have a personal right, but which is to be given only to such as need in the opinion of the trustees, and to be given to them according to their necessities. If the case of *Attorney-General* v. *Price* and *Isaac* v. *De Friez* had been before Vice-Chancellor *Wigram* in *Liley* v. *Hey*, I should probably have followed the more recent decision; but as it is I am not entitled to dissent from authorities so much in point, and which have never been questioned, and therefore I hold this to be a charitable bequest. There will be a declaration accordingly, and that the realty and impure

(1) 17 Ves. 371.
(2) Amb. 595.
(3) 1 Hare, 580.
(4) 17 Ves. 374.

personalty belong to the heir-at-law and next of kin of the testator respectively, and a direction for a scheme in reference to the pure personalty. The costs of the Attorney-General and all other parties as between solicitor and client must be apportioned between the pure and impure personalty, and the real estate will not bear any costs.

Solicitors: Messrs. *Rhodes & Son;* Messrs. *Raven & Bradley, Solicitors to the Treasury.*

In re AYLWIN'S TRUSTS.

Will—Construction—Gift for Life or until Bankruptcy or Insolvency—Gift over to Children—Effect of a Declaration of Insolvency in South Australia —Power of Appointment.

A testator gave his interest in leasehold property in *Wales* to trustees to pay half of the rents to his son *H.* for life, or until his bankruptcy or insolvency, and after his decease or bankruptcy or insolvency to pay the same for the benefit of all or any of his children as he should appoint, and in default of appointment to pay the same for the benefit of all the children equally. *H.* carried on business at *Adelaide, S.A.*, for some years, and while residing there filed, in July, 1863, a declaration in insolvency. He, after obtaining his certificate in December, 1864, returned to *England.* He had five children, one being born after the date of the insolvency. There was a gift for the benefit of another son, *F.*, and his children in similar terms of the remaining half of the rents, and there was a proviso in the will, that if at the death of the testator's wife *F.* or *H.*, or the issue of either who should be dead, should become entitled in possession to other estates, called *De Coetlogan*, he or they should take no part of the rents of the leasehold property, but that the other son, or his issue, should take the whole of such rents. The testator's widow died in 1866, and thereupon *F.* became entitled to the *De Coetlogan* estates:—

Held, that the gift over took effect on the declaration of insolvency; that the power of appointment was unaffected by the insolvency, and that it was subsisting; and that on the death of the widow new trusts affecting the entirety of the rents arose, which, subject to *H.'s* power of appointment, were for the benefit of his five children.

Haswell v. *Haswell* (1) and *Wickham* v. *Wing* (2) considered.

GEORGE ALLEN AYLWIN, who died on the 27th of April, 1862, by will dated the 30th of January, 1858, gave the interest

(1) 2 D. F. & J. 456. (2) 2 H. & M. 436.

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to which he was entitled in certain leases in collieries and lands in the county of *Brecon* to trustees (whom he also appointed executors of his will), their executors, &c., upon trust to permit his wife to receive the rents and profits during her life, such rents and profits being applied in manner thereinafter directed, and after her decease to pay £100 a year to her son *Horace* and his assigns until his decease, or the expiration of the leases, and subject thereto to pay one equal half part of the rents and profits to *F. A. Aylwin* during his life or until his bankruptcy or insolvency, and after his decease or bankruptcy or insolvency to pay the same for the benefit of all or any of his children in such manner as he should by deed or will appoint, and in default of appointment to pay the same for the benefit of all his children and their respective executors, &c., equally, and in default of such issue to pay the same to *F. A. Aylwin*, his executors, &c.; "and to pay the remaining half part of the said rents and profits, as the same should be received, to *Herbert Aylwin* during his life, or until his bankruptcy or insolvency, and from and after his decease or bankruptcy or insolvency, which shall first happen, to pay and apply the same for the benefit of all or any of the children of the said *Herbert Aylwin* in such manner as the said *Herbert Aylwin* shall by deed or will appoint, and in default of such appointment, or so far as any such appointment, if incomplete, shall not extend, to pay and apply the same for the benefit of all the children of the said *Herbert Aylwin* and their respective executors, administrators, and assigns, equally to be divided between them, and in default of such issue to pay the same to the said *Herbert Aylwin*, his executors, administrators, and assigns." The testator then directed his wife (who was one of the trustees), out of the rents and profits, to pay £100 a year to his son *Horace* for life, and subject thereto to pay one equal half part of the rents and profits to *F. A. Aylwin* for life, or until his bankruptcy or insolvency and after his decease or bankruptcy or insolvency to pay the same for the benefit of all or any of his children in such manner as he should by deed or will appoint, and in default of appointment to pay the same for the benefit of all his children and their respective executors, &c., equally, and in default of such issue to pay the same to him, his executors, &c.; "and to pay the remaining one equal half part thereof to the said

Herbert Aylwin during his life, or until his bankruptcy or insolvency, and from and after his decease or bankruptcy or insolvency, which shall first happen, to pay and apply the same for the benefit of all or any of the children of the said *Herbert Aylwin*, in such manner as the said *Herbert Aylwin* shall by deed or will appoint; and in default of such appointment, or so far as any such appointment, if incomplete, shall not extend, to pay and apply the same for the benefit of all the children of the said *Herbert Aylwin* and their respective executors, administrators, and assigns, equally to be divided between them, and in default of such issue to pay the same to the said *Herbert Aylwin*, his executors, administrators, and assigns." The will contained a proviso that if at the death of his wife either of his sons, *F. A. Aylwin* and *Herbert Aylwin*, or the issue of either of them who should be dead leaving issue, should become entitled in possession to the estates devised by the will of Mrs. *De Coetlogan*, that such one of them who or whose issue should so become entitled should take no part or share of the rents of his collieries and property in the county of *Brecon*, except such rents and profits as he or his issue might have received during the life of his wife, then and in such case the other, or the issue of the other of them as the case might be, should take the whole of the said rents.

The testator's widow died on the 28th of February, 1866.

In the estates devised by the will of Mrs. *De Coetlogan* the testator's wife had a life interest, and on her death *F. A. Aylwin* became entitled in possession under the will of Mrs. *De Coetlogan* to the estates referred to in the will of the testator.

For some years previously to the death of the testator, *Herbert Aylwin* resided and carried on business as a merchant at *Adelaide, South Australia;* and on the 21st of July, 1863, after the death of his father, he, under the provisions of the *South Australian Insolvent Act*, 1860, filed a declaration of insolvency in the Court of Insolvency at *Adelaide*. He was shortly afterwards adjudged insolvent, and official and creditors' assignees of his estates and effects were appointed. He, on the 23rd of December, 1864, obtained his certificate of final discharge. At the dates of such declaration and adjudication *Herbert Aylwin* had issue living four children, the Petitioners, one of whom at the date of this Petition had attained

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the age of twenty-one years, and the other three were infants. A fifth child, a Respondent, was born on the 22nd of September, 1864.

The trustees had received rents of the property in the county of *Brecon*, and had paid a sum into Court under the provisions of the *Trustee Relief Act*, a question having, since the attaining of majority of one of the Petitioners, been raised whether the trustees could with safety continue to do what they had done, pay over the whole of such rents to *Herbert Aylwin* for the maintenance and education of his children, having regard to the fact of his insolvency in *Australia*.

The Petitioners insisted that, upon the true construction of the will, and in the events which had happened, they were absolutely entitled in equal shares to the rents and profits arising from the colliery property; and they prayed that, after the payment of the costs in reference to this application, the residue might be divided into four equal parts, and that one such part might be paid to the Petitioner who had attained majority for her own use, and that the remaining three-fourths thereof might be paid to *Herbert Aylwin*, to be applied by him for the maintenance, education, and support of the three infant Petitioners.

Mr. *Karslake*, Q.C., and Mr. *Phear*, for the Petitioners:—

It is admitted that *Herbert Aylwin* did become insolvent in *South Australia*. Upon the insolvency the gift to him ceased. Then the question is, who are entitled under the gift over? and it is submitted that the four Petitioners are, as in all these cases, where a certain event determines the life interest, those who are *in esse* at that time constitute the class who are to take.

[They cited *In re Blithman* (1); *In re Davidson's Settlement Trusts* (2); *Mann* v. *Thompson* (3); *Townsend* v. *Early* (4).]

Mr. *Lindley*, Q.C., and Mr. *R. Horton Smith*, for the Respondent, the child born in September, 1864, contended that he was entitled to a share. The gift over did not take effect upon the insolvency. Assuming however that it did, it was only as to the

(1) Law Rep. 2 Eq. 23. 12 Jur NS 84
(2) Ibid. 15 Eq. 383.
(3) Kay, 638. 18 Jur 826
(4) 34 Beav. 23. 10 Jur NS 8
(11 LC 35 Beav 219

moiety in which *Herbert Aylwin* had a life interest before his brother became entitled to the *Coetlogan* estates. But the gift over did not take effect, for there was a power of appointment left in *Herbert Aylwin*, and he could now exercise it both as regarded the fund and the rents.

[They referred to *Evans* v. *Harris* (1); *Oppenheim* v. *Henry* (2); *Parsons* v. *Parsons* (3).]

Mr. *Dickinson*, Q.C., and Mr. *Bradford*, for *Herbert Aylwin*, submitted that he was still entitled to a life interest in the property. If the gift had been to him, residing in this country, until bankruptcy or insolvency under the statute in force in this country, the property given by the testator to *Herbert Aylwin* would, but for the gift over, by virtue of his insolvency have become vested in the assignees under the Act. It must have been that which was in the contemplation of the testator. This was a colonial insolvency. There might be a difference between an insolvency under the English law and the colonial law; at any rate, what took place in *South Australia* did not make *Herbert Aylwin* bankrupt or insolvent in this country; nor had the property been affected by what took place in the colony. *Herbert Aylwin* was always a domiciled Englishman, and he took the bounty intended for him under the will of another domiciled Englishman. The event had not happened upon which the property was given over, and therefore *Herbert Aylwin* was still tenant for life.

[They cited *Haswell* v. *Haswell* (4); *White* v. *Chitty* (5); *Lloyd* v. *Lloyd* (6); *Trappes* v. *Meredith* (7); same case, No. 2 (8); and 24 & 25 Vict. c. 134, s. 218.]

In re Blithman (9) did not apply, because the fund in question there was pure personalty, and in *In re Davidson's Settlement Trusts* (10) the assignee in *Australia* should have been required to take proceedings in the Bankruptcy Court in this country before the money was paid by this Court to him.

(1) 5 Beav. 45.
(2) 10 Hare, 441.
(3) 9 Mod. 464.
(4) 2 D. F. & J. 456.
(5) Law Rep. 1 Eq. 372.
(6) Law Rep. 2 Eq. 722.
(7) Ibid. 9 Eq. 229.
(8) Ibid. 10 Eq. 604.
(9) Ibid. 2 Eq. 23.
(10) Ibid. 15 Eq. 383.

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The VICE-CHANCELLOR referred to *Wickham* v. *Wing* (1).

Mr. *Nalder* appeared for the trustees.

Mr. *Karslake*, in reply, contended that both moieties of the property became affected by the insolvency; that, upon the authority of *Haswell* v. *Haswell* (2), the power given to *Herbert Aylwin* was gone, and that those children only who were *in esse* at the period of the insolvency could take. That was the period when the corpus became divisible.

July 2. SIR JOHN WICKENS, V.C.:—

The first question in this case is whether the gift over on the bankruptcy or insolvency of *Herbert Aylwin* took effect when in July, 1863, he became insolvent at *Adelaide*.

No doubt the testator contemplated a judicial insolvency, and primarily one under English law. But it would be to narrow the meaning of the words unfairly if that which the 218th section of the *Bankruptcy Act*, 1861, calls a bankruptcy or insolvency, and recognises as sufficient foundation for English bankruptcy proceedings, were to be considered as a process so distinct from English bankruptcy or insolvency that the words in an English will would not aptly describe it. It is said, indeed, that the property in this case being English leasehold did not vest in the Australian assignees as it would have done if the insolvency had been English. But this does not make it less an insolvency that the Australian assignees did not take proceedings under the 218th section; to make it so vest can hardly affect the meaning of the clause any more than it would have been affected if *Herbert Aylwin* had alienated his interest before the bankruptcy. Such a clause, though to be construed strictly, is not to be deprived of its ordinary meaning on a conjectural view of the testator's motives. When *Herbert Aylwin* became bankrupt he had, it seems, four children living; a fifth, *Charles Reginald Aylwin*, was born in September, 1864, after *Herbert's* insolvency, but before his mother's death. I think that on his bankruptcy the one moiety of the *Brecon* rents

(1) 2 H. & M. 436. (2) 2 D. F. & J. 456.

which he was entitled to during the joint lives of his mother and himself went over subject to the power (if it remained) to his four children then living. The mother died in 1866, and then the trust declared of the *Brecon* rents after her death took effect. The will is very singularly framed, but these trusts are separately declared, though in the same words as those which come after and which declare the trusts during the widow's lifetime. After some hesitation I have come to the conclusion that, on the death of Mrs. *Aylwin*, and the simultaneous vesting of the *De Coetlogan* estates in *Frederick Arthur Aylwin*, new trusts affecting the entirety of the *Brecon* rents arose which were (subject to *Horace's* annuity) identical with trusts declared of *Herbert Aylwin's* moiety to take effect after the wife's death. From this construction, which does less violence to the words and the apparent intentions than any other which occurs to me, it would follow that on Mrs. *Aylwin's* death, and subject to the annuity and to *Herbert's* power of appointment if then subsisting, the *Brecon* rents became payable to *Herbert's* five children. As regards the power, the authorities leave the matter in a state of some perplexity. But I think that, consistently with *Haswell* v. *Haswell* (1), as explained by Lord *Hatherley* in *Wickham* v. *Wing* (2), and by *In re Stone's Estate* (3) the power given by this will, which is a power to direct the payment of the rents of leaseholds as received, and which so far resembles *Wickham* v. *Wing* more nearly than *Haswell* v. *Haswell*, may be considered as unaffected by the insolvency, and that it is therefore a subsisting power. The result will be that the fund now in Court, which represents, as I gather, rents up to the end of 1872, and is legally in the same position as if now in the trustees' hands, is still subject to the power, and that *Herbert Aylwin* may either now exercise the power or decline to do so with regard to it, in which latter case the fund will go as in default of appointment. But I assume that he will exercise the power, and that the Petition will be amended by stating the appointment to which the Court will then give effect.

Solicitor: Mr. *Sherring*.

(1) 2 D. F. & J. 456. (2) 2 H. & M. 436. (3) 3 Ir. Eq. Rep. 621.

6 Jur. N.S. 1222. 11 Jur. N.S. 425.

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1873

July 10, 12, 15.

THOMPSON *v.* BURRA.

[1871 T. 127.]

Will—Annuity to Widow—Freebench—Leasing Powers—Election.

Gift by a testator of a legacy of £200 and an annuity of £700 to his widow (for life or until her second marriage), charged upon part of his freehold and copyhold hereditaments, with a direction that she should occupy his mansion house and enjoy the rents of a portion of the property. The testator then devised his real estate specifically, and gave to his trustees powers of management and leasing. His real estate consisted chiefly of customary lands, out of which his widow was entitled to freebench; but the evidence shewed that in no instance in these manors had a widow ever been admitted or her freebench set out by metes and bounds :—

Held, that the widow was put to her election.

MATTHEW THOMPSON, of *Stobars Hall*, by his will, dated the 6th of May, 1871, having appointed the Defendants *R. Burra* and *J. B. Davis* his executors and trustees, made the following disposition :—

He appointed his widow and his executors to be guardians of his children during their minorities. He bequeathed to his wife £200, to be paid immediately, and all the consumable household stores about his mansion at *Stobars;* and he bequeathed to his wife, so long as she should remain his widow, a clear annuity of £700, to be computed from the time of his decease, and to be payable half-yearly, and he charged the annuity upon the property comprised in the first schedule to his will in entire exoneration of all other his real and personal estate, and directed the same should be paid and kept down out of the rents and profits thereof accordingly; he gave his household furniture, plate, linen, carriages, and horses and farming implements about the mansion house, to his trustees upon trust to permit his widow to use them as long as, under the trusts of the will, she should be entitled to the use and occupation of the mansion. He gave to his sisters *Maria Thompson* and *Agnes Elyetson Thompson* all the property comprised in the second schedule, together with the rights, members, and appurtenances thereof, to hold the same unto his said two sisters and their heirs as joint tenants; and he bequeathed to his

said two sisters his brown mare. All the property comprised in the third schedule he gave to his trustees upon trust to pay the rents, issues, and profits unto his daughter *Mary Thompson* during her life to her separate use, without power of anticipation, and from and after her decease upon trust for such of her sons in such shares, subject to such trusts or powers and generally as *Mary Thompson* should by deed or will appoint, and in default of appointment on trust for every son who should attain twenty-one, with limitations over. Then followed a gift of £10,000 on trust for the education of his daughter *Edith Annie Thompson*, remainder, on attaining twenty-five or marriage, to her for life, without power of anticipation, with other provisions for her children. The testator then devised all his freehold customary copyhold and leasehold estates not previously disposed of to the use of his trustees upon trusts, as to his freehold mansion at *Stobars*, and all the property comprised in the first part of the first schedule to his will, so long as "my said wife *Annie Thompson* shall continue to be my widow, and shall in each and every successive term of twelve months, reckoning from my decease, reside in and occupy my said mansion during ten months of each term, unless prevented by illness or accident from so doing, to permit her to reside in and occupy my mansion, and to have the use or receive the rents and profits of the other property comprised in the first part of said schedule to this my will, (in addition to the annuity, which is not to be diminished or abate during such time as, under the foregoing conditional trusts, she may be entitled to part of the property charged therewith, but is, in the meantime, to be paid in full out of the remainder of the last-mentioned property,)"—and upon trust as to all his real estate comprised under the foregoing general devise (subject and without prejudice to the said annuity and conditional trusts as to such parts as were made subject thereto), upon trust that the trustees should (if the personal estate should be insufficient for the payment of funeral and testamentary expenses and debts and legacies given by the will or codicil, including the gift of £10,000) raise by accumulation of rents and profits sufficient to make up the deficiency, and, subject to the trusts aforesaid, on trust to stand possessed of his real estate comprised under the general devise upon the trusts following, viz.: as to his

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mansion at *Stobars*, and all the property comprised in the first part of the first schedule, during the life and minority of his eldest son, to apply so much as might be necessary for his education and advancement in life when not residing with his mother at *Stobars*, and upon trust to accumulate all the surplus and add the same to the capital share, thereinafter bequeathed in trust for his eldest son, for life, of and in his residuary personal estate.

Then followed a provision that so soon as his eldest son should attain twenty-one the trustees should stand possessed of the property comprised in the second part of the first schedule on trust for his said son for life; and then followed a series of limitations in the event of his eldest son having no children. The testator then directed his trustees to stand possessed of the property comprised in the fourth schedule upon similar trusts for his son *G. E. Thompson;* and as to all the other his real estate he directed his trustees to stand possessed of it upon trust, as to one moiety, upon the trusts declared as to the property comprised in the second part of the first schedule; and, as to the other moiety, upon the trusts declared as to the property comprised in the fourth schedule. The testator then directed his trustees to collect his remaining personal estate, to pay debts, and, upon trust as to one moiety, to invest the same in the purchase of freehold, customary, or copyhold hereditaments in *England* or *Wales*, to be conveyed to the trustees according to the tenure thereof, and to be held by them upon the trusts declared as to the property comprised in the second part of the first schedule, and a similar trust as to the other moiety to be held on the trusts declared as to the land comprised in the fourth schedule.

Then followed powers to the trustees to partition.

Power to his sons to jointure.

Power to the trustees to make advancement for children.

Then followed powers of management in the following form:—

Provided also, and I hereby declare, that as to any freehold, customary, copyhold, or leasehold hereditaments or tenements for the time being subject to the trusts of this my will, and of which there shall not for the time being be any person of the age of twenty-one years beneficially entitled to the possession or receipt of the rents and profits thereof under the trusts of

this my will, it shall be lawful for the said trustees or trustee to manage such hereditaments and tenements respectively, and to make allowances to and settle accounts with tenants, and to fell timber for repairs, and to preserve game, and to insure and to make such disbursements for expenses of management (including the salary, commission, or other remuneration of any paid agent or agents), and for repairs, insurances, and other outgoings as the said trustees or trustee may think fit; and I authorize the said trustees and trustee to permit either of my sons who for the time being shall be entitled to my said mansion as tenant for life in immediate expectancy, on his attaining the age of twenty-five years, to reside in and occupy the same between the ages of twenty-one and twenty-five years, if the said trustees or trustee shall think fit: Provided also, and I hereby declare, that it shall be lawful for the said trustees or trustee, at any time or times, to demise all or any part or parts of the freehold, customary, copyhold, or leasehold hereditaments or tenements for the time being subject to the trusts of this my will for any term or terms of years in possession, or to take effect within six calendar months after the making thereof, not exceeding for an agricultural or occupation lease twenty-one years, or for a mining lease of water, water-mills, way-leaves, water-leaves, or other rights or easements, forty years, and for a building lease ninety-nine years, at such rent or rents, either uniform or not, without taking any fine or premium or other benefit in the nature of a fine or premium, and subject to such covenants, conditions, and stipulations as the said trustees or trustee may think reasonable or proper, and to accept surrenders of any leases which for the time being may exist upon such terms as they or he may think fit, and for any of the purposes aforesaid to make and rescind or vary such contracts as they or he may think fit: Provided also, and I hereby declare, that it shall be lawful for the trustees or trustee for the time being to make partition of any hereditaments whereof any undivided share or shares is or are hereby devised, with liberty to give or accept any sum or sums of money for equality of exchange or partition, and to enfranchise or concur in enfranchising any customary or copyhold hereditaments which shall be holden of any manor subject to the trusts hereof, and, on such enfranchisement, to grant

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any commonable rights which may be thereby extinguished, and generally exercise all manorial rights appurtenant thereto: Provided nevertheless that no lease or partition shall be made or taken under the powers lastly hereinbefore contained as to any hereditaments or tenements whereof there shall be for the time being any person or persons of the age of twenty-one years entitled beneficially for life or in tail by purchase under the trusts of this my will, either in possession or in immediate expectancy, on his attaining the age of twenty-five years, without the previous consent in writing of each such person respectively.

Then, after several provisions immaterial to the present question, followed the four schedules setting out the descriptions of the parcels. The first part of the first schedule comprised the freeholds and certain customary lands.

The testator died on the 9th of May, 1871, and his will was proved by his executors. He left his widow and several children him surviving. The bill was filed on the 9th of December, 1871, and on the 17th of February, 1872, the usual decree was made, and numerous inquiries were directed.

The eleventh inquiry was, what real and leasehold estates were comprised in the several schedules to the testator's will, and what were the rentals of such real and leasehold estates, and which of such real estates are copyhold or customaryhold, and which, if any, of them are subject to any and what rights of freebench in favour of the testator's widow?

The twelfth inquiry was to the same effect as to estates not comprised in the schedules.

The Chief Clerk, by his certificate, found the several properties which were liable to the widow's freebench; and it appeared from the certificate that all the schedules to the testator's will contained customary lands.

When the cause first came on, it stood over with a view to obtain further evidence as to the custom of the manors, which was now produced.

Edward Heelis, the steward of the manor of *Kirkby Stephen*, *Brough*, *Winton*, and *Mallerstong*, *Westmoreland*, within which the testator had customary lands, deposed, "That according to the custom of the said manors, the interest which a widow is entitled to

in the nature of dower or freebench is one-half the customary estate, or the rents or profits thereof for life. I am not aware of any instance where this estate has been set out by metes and bounds, nor is there any instance that I am able to find from the Court books in my possession of a widow having been admitted to a moiety or other share of the estate in respect of her freebench; but in all cases of intestacies or wills the heir-at-law or devisee has been admitted to the whole estate."

Thomas Harrison, steward of the manor of *Smardale*, deposed that the customary lands held by the testator were held according to the ancient custom of tenant right; that on the death of a tenant his widow was, by the custom of the said manor, entitled to hold the whole of the customaryhold lands of which he died seised during her *chaste viduité*.

Edward Blaymire, steward of the manors of *Hartley*, *Kirkby Stephen*, *Soulby*, *Great* and *Little Musgrave*, and *Bleatarn*, deposed that a portion of the customary lands held by the testator within the said manors were held according to the ancient custom of tenant right, and as customary estates of inheritance descendible from ancestor to heir under certain ancient yearly rents and such general and dropping fines as were settled by a decree of this Court. That the freehold of the said customary estates was in the lord, who, on application from the tenant, enfranchised the same. That according to the custom of the said manor the widow was entitled during widowhood to one-third of the customary estates, but he could find no instance in any one of those manors of freebench having been set out by metes and bounds, and it was not the custom for the widow to be admitted.

Lawrence Harrison, steward of the manor of *Langdale, Westmoreland*, deposed that the customary lands held by the testator were held according to the ancient custom of inheritance descendible from ancestor to heir. The freehold was in the lord. He further deposed—"That according to the custom of the said manor, I am informed, and believe, the widow is entitled during widowhood to one-third of the customary estates; but I find no instance in this manor of freebench having been set out by metes and bounds, and it is not the custom of the manor for the widow to be so admitted."

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Mr. *Lindley*, Q.C., and Mr. *Waller*, for the Plaintiffs.

Mr. *Joshua Williams*, Q.C., and Mr. *Kekewich*, for two of the beneficiaries under the will:—

The will contains a specific devise of all the testator's lands, including the customary lands in respect of which the widow is entitled to her freebench, and the case falls, therefore, within the general rule which puts the widow to her election. The principle on which the Court acts is clearly settled by the cases collected in the note to *Gretton* v. *Haward* (1), and it is this, that where a case of election arises, and in the event of a beneficiary electing to take against the instrument, the Court assumes jurisdiction to sequester the benefit intended for the refractory donee, in order to compensate those who are disappointed by his election to take against the instrument. Of course, should there be any surplus after making such compensation, it would not be undisposed of, but would belong to the widow. Should she elect to take against the will in this case, she must give up all the benefits, whether included in the same devise or not.

Mr. *Dickinson*, Q.C., and Mr. *W. Barber*, for the widow:—

The burden of proof lies on those who attempt to deprive the widow of her legal right; mere surmise that the testator meant to do something inconsistent with that right is not enough: *Dummer* v. *Pitcher* (2). In *Birmingham* v. *Kirwan* (3), Lord *Redesdale* said: "An intent to exclude the widow's right must be demonstrated by express words or necessary implication;" and it must appear on the face of the will or instrument itself. Nothing of that kind is to be found here. It has been said that the power given to the trustees to manage the estates is inconsistent with the widow's right to freebench; but suppose there had been a rent-charge on the estate, it seems now to be quite settled, though some of the older authorities are conflicting, that a rent-charge or an annuity does not put the widow to elect: *Miall* v. *Brain* (4); *Dowson* v. *Bell* (5); *Holdich* v. *Holdich* (6); *Lowes* v. *Lowes* (7); *Hall* v.

(1) 1 Sw. 433.
(2) 2 My. & K. 262.
(3) 2 Sch. & Lef. 444.
(4) 4 Madd. 119.
(5) 1 Keen, 761.
(6) 2 Y. & C. Ch. 18.
(7) 5 Hare, 501.

Hill (1). In *Lawrence* v. *Lawrence* (2), and in *Harrison* v. *Harrison* (3), the widow took part of the estate under the will, but was held not deprived of her dower. So in *Ellis* v. *Lewis* (4), where land was devised in trust for sale, the direction as to the application of the proceeds was held not to put the widow to her election. It is clear a mere power of sale is not sufficient: *Bending* v. *Bending* (5).

Then it is said that a direction to carry on a farm is inconsistent with the widow's right to dower, *Butcher* v. *Kemp* (6), or a leasing power to trustees: *Hall* v. *Hill; Parker* v. *Sowerby* (7); *Linley* v. *Taylor* (8); *O'Hara* v. *Chaine* (9); but it must be noticed as to these cases that the authorities on this point are not always reconcilable with each other, and, further, that the reasoning is often illogical in principle. If a power of sale to trustees is not inconsistent with a widow's right to dower, how can a leasing power, which is a more limited power, be so? Vice-Chancellor *Stuart* in *Linley* v. *Taylor* (10) adverts to this departure from principle.

But, further, in all those cases which are adverse to the right of a widow the *ratio decidendi* is that the right to dower is a pure legal right, and is worked out by setting out a third part of the land. But this reasoning has no application to the present case. Here the widow has no legal estate, nor could she bring ejectment before assignment: *Chapman* v. *Sharpe* (11). As is shewn by the evidence, she is not admitted in those manors, nor is her freebench ever set out by metes and bounds. Her interest, therefore, is not a strictly legal one within the meaning of the cases, but is in the nature of a rent-charge, which, as has been shewn above, is held to be not inconsistent with a devise by the testator of the land so charged, and is not sufficient to put the widow to her election.

[They also cited *Bristow* v. *Warde* (12).]

Mr. *Joshua Williams*, in reply:—

It is well settled now that a power given by the testator to his

(1) 1 D. & War. 94.
(2) 2 Vern. 365.
(3) 1 Keen, 765.
(4) 3 Hare, 310.
(5) 3 K. & J. 257.
(6) 5 Madd. 61.
(7) 1 Drew. 489; 4 D. M. & G. 321.
(8) 1 Giff. 67.
(9) 1 J. & Lat. 662.
(10) 1 Giff. 67.
(11) 2 Show. 198.
(12) 2 Ves. 336.

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trustees to lease or manage his real estate puts the widow to her election: *Lowes* v. *Lowes* (1); *Grayson* v. *Deakin* (2); *Linley* v. *Taylor* (3); *Miller* v. *Thurgood* (4). The question is not what custom may exist in a particular manor, but what is the general law. It has not been shewn here that the widow may by the custom of these manors have a third of the rent in the nature of a rent-charge. Such a special custom may perhaps exist, but it does not exist here. By special custom she may have part of the land and part of the rent: "Customs of *West Sheen*" (5). The evidence in the present case shews that she is entitled to one-third of the customary lands, and not to any share in the rents. Then it is said she cannot bring ejectment before assignment; perhaps so; but her simple remedy is to have an assignment by plaint in the Lord's Court: *Watkins* on Copyholds (6); and then, if not before, she may bring ejectment: *Watkins* on Copyholds (7).

Then it is said the widow's right here is in the nature of a rent-charge; but there is no authority in the books to shew that she shall have a rent-charge by way of freebench. Her right is to one-third of the land, which is a legal right; but a right to a third of the rent must be an equitable right.

Then it is said that the widow has no right to be admitted; but admittance is unnecessary, as she is in of her husband's seizin. *Watkins* thus lays down the principle (8): "A widow taking freebench is said to continue the seizin of the deceased;" and again: "There are indeed books in which it is laid down that the widow must be admitted to her freebench and pay her fine; yet, according to others, which seems the better opinion, she shall be in of the estate of her husband without admission, and consequently without fine: the estate in freebench being considered as an excrescence growing of itself out of that of the husband, and being, as it were, a continuance of it" (9).

Then it is said there is no instance of the freebench being laid out by metes and bounds, but that circumstance proves nothing.

(1) 5 Hare, 501.
(2) 3 De G. & Sm. 298.
(3) 1 Giff. 67–73.
(4) 33 Beav. 496, 500.
(5) 4th Ed. vol. ii. p. 69.
(6) Ibid. p. 72.
(7) Ibid. p. 59.
(8) Ibid. vol. i. c. 6, p. 334.
(9) 4th Ed. vol. i. c. 7, p 362.

No doubt the right is that contended for; and the claim is settled by arrangement.

If, then, the widow's interest is to have one-third of her husband's customary lands, it is clear he has dealt with the whole as if it were his own, and in a manner inconsistent with the widow's claim. She must therefore elect.

[He also cited *Roadley* v. *Dixon* (1).]

Mr. *Greene*, Q.C., Mr. *Fooks*, Q.C., Mr. *Chapman Barber*, Mr. *Bunting*, and Mr. *Fooks*, jun., were for other parties.

July 15. SIR JOHN WICKENS, V.C.:—

This is a case arising on a very difficult and unsatisfactory branch of law, and to be determined upon very meagre materials; but I must do the best with it I can. It is laid down as settled law that a widow entitled to dower under the old law, or freebench, and taking benefits under her late husband's will, is not compelled to elect between them, unless there is on the face of the will strong ground for holding that she was not intended by the testator to take both. Mere conjecture or surmise will not raise an election in the case of a widow, any more than it will in another case. On principle it would have seemed that there were considerations applicable to a widow's case which do not apply, or do not except in very similar cases apply, to any other case of election. When a man makes a will, by which he gives to his widow benefits carefully measured and defined, there is a strong presumption that he intends her to take nothing more. Supposing, as a mere illustration, a testator to give out of his property, subject to dower or freebench, so much as will, with his widow's interest under her marriage settlement, make up £900 a year while she lives, and his children are infants; to be increased by £150 when his son goes to college; to be diminished by £100 when his daughter marries; and to be reduced by half if the widow marries again; there would seem to be the strongest possible presumption that he did not intend her to take out of his property more than that which he had carefully measured out to her. In other cases,

(1) 3 Russ. 192.

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of course, the argument might be stronger or weaker. The case I have put is a mere illustration. Hence the inconvenient and most unsatisfactory rule as to the effect of a rent-charge to the widow, which is examined by Lord *St. Leonards* in *Hall* v. *Hill* (1); and which comes in effect to this, that it is by no means conclusive, but a circumstance to which weight is to be attributed.

I may say that further consideration of the case of *Hall* v. *Hill* has convinced me how very important and valuable that judgment is upon this point. Similar considerations may apply to the devise of property to a third person and the widow in specified shares. Supposing a testator should sort out his property, and specify what he intends for his widow for life, with remainder; what, for instance, for his stepson; what for his brother, what for his sister; what for an elder nephew; there may be presumption that he made the division because he thought it fair and convenient, and with no contemplation of its being for a time disarranged by his widow asserting a right paramount to the will In this case, also, the widow is *primâ facie* not put to her election but it is (as Lord *St. Leonards* points out in *Hall* v. *Hill*) a circumstance in favour of putting her to it. A power of sale, or a trust for sale, affords, in general, but a slight presumption against the widow; and it has often been said that no directions for distributing purchase-money can logically be relied on to raise one; and that the cases where they have been relied on cannot be supported. I think that if it were necessary I could suggest cases, analogous to those I have already suggested, in which the mode of division of the money was perfectly conclusive to shew that the testator intended his wife to have out of his property that particular sum of money and no more.

Then, again, comes the circumstance, not without weight, yet in no degree conclusive, that, on the other hand, a power of leasing has been held as conclusive, or almost conclusive, against the widow in a great many cases of the highest possible authority; and if I could treat it as quite clear that the right of the widow in those manors (I am speaking now of the manors in which she takes an aliquot part), that the right of the widow was a right which would have to be worked out, if opposed, by setting out the

(1) 1 D. & War. 94.

land by metes and bounds—those cases would govern the present. My impression is, on grounds I am about presently to mention, that that, as Mr. *Williams* contends, is the true legal construction of the very unsatisfactory evidence before me. But I think that if it were not so, although the special efficacy attributed to a power of leasing depends in most or all of the cases upon the incompatibility of it with the setting out of metes and bounds, yet I think that this power of leasing is almost or quite equally inconsistent with anything in the nature of a right to an aliquot part of the rents. Of course there might be a custom that when the widow was entitled to a share of the rents she should not be deprived of all interest, if the heir or devisee occupied. There might be a custom that the homage should fix a pecuniary value for the property, out of which freebench was to come; and that she should have, in some way or other (call it a rent-charge, or what you please), a benefit equal to a third part of that pecuniary value, whatever the actual rent was. But there is no trace of anything of the sort in this case, or, I believe, in any of the other cases. Supposing her, then, to be entitled to have a share of the rents actually paid, the power is, that "it shall be lawful for the trustee or trustees at any time or times to demise all or any part or parts of the freehold, customary, copyhold, or leasehold hereditaments or tenements for the time being, subject to the trusts of this my will, for any term or terms of years in possession, or to take effect within six calendar months after the making thereof, not exceeding for an agricultural or occupation lease twenty-one years, or for a mining lease of water, water-mills, way-leaves, water-leaves, or other rights or easements, forty years, and for a building lease ninety-nine years, at such rent or rents, either uniform or not, without taking any fine, or premium, or other benefit in the nature of a fine or premium, and subject to such covenants, conditions, and stipulations as the said trustees or trustee may think reasonable or proper, and to accept surrenders of any leases which for the time being may exist upon such terms as they or he may think fit; and for any of the purposes aforesaid to make and rescind or vary such contracts as they or he may think fit." It appears to me that if the right of the widow is a right to the rents as distinguished from the land being set out by metes and

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bounds, then, according to the ordinary meaning of those words, the trustees had a power and discretion given to them which they could not exercise except with the widow's assent. She would necessarily be entitled to object to their leasing at a peppercorn for the first ten years, or to their rescinding an agricultural lease and granting a building lease; all of which powers the testator intended that they should have, and expressed clearly that he intended they should have. Therefore it appears to me not material to my decision to consider strictly whether I am to take these imperfectly stated customs as involving a right of the widow to have metes and bounds set out. I think that on the materials that is the safer conclusion to come to; with regard, of course, to the manors in which she has freebench of a half, or a third. There is no question, it seems, in any of the manors, of freebench being asserted adversely, either as a right to an aliquot part of the rents, or to have an aliquot share of the lands set out. This being so, the legal presumption seems to me to be that the remedy, if enforced, would be in the latter form. The analogy of dower points strongly to this, and it seems much easier to conceive a plaint in the manor court to have freebench by metes and bounds, than a plaint for an aliquot proportion of the rents; which, as I have already mentioned, could, I suppose, be allotted only by setting a value on the land, and compelling the heir or devisee to pay a given portion of it; or else by attributing to the widow a third part, or a half of the rents, whatever they may be. Nor does there seem to be any reason, from the nature of the property, why the power of leasing should not have the same effect here as was originally attributed to it with regard to freehold lands. It extends expressly to customary lands, and, of course, independently of any assent by the lord, would be presumably, and according to the common law of copyholds (if I may so say), good to the extent of a lease for a year. But with the lord's assent it would be perfectly good to the extent of the terms mentioned in the power; and I cannot help thinking that the testator assumed that the lord's assent could be obtained—as I suppose it could—upon perfectly well-known terms, of which the trustees were the judges: that is to say, I presume that in most of the manors, for instance, where there are mines, which make a lease of forty years

desirable, and where there is building property, I presume it is perfectly well understood that the fines are regulated on a certain scale; and that the lease is granted almost as a matter of course, on the payment of a sum of money which can be assessed on known principles. I should observe with regard to the power being a power to lease for a year only, that of course that very much weakens the argument with reference to some of the expressions in the power; but that the power which was said to be sufficient of itself, other grounds being wanting, in *O'Hara* v. *Chaine* (1), was a power to lease from year to year only.

On the whole, I think that the widow must elect. The defined rent-charge out of part of the land subject to freebench; the devise to her for life of part of the land so subject; the careful sorting out and definition of interest by means of four schedules; all corroborate the presumption which the authorities, I think, warrant me in drawing from the power of leasing; and tend to shew that if there were no authorities, but the result was to be deduced from the whole scope of the will, and not otherwise, the conclusion must have been the same. In fact, I am convinced that the testator, if he had been asked, would have said without hesitation that he intended to put the widow to her election; that is, that he intended her to have no benefits in his property except what she took under his will. I am glad, therefore, to be warranted, as I think I am, in saying that he sufficiently expressed his wish.

Solicitors for the Plaintiffs, and Widow: Messrs. *Church & Clarke*, agents for *T. H. Preston, Kirkby Stephen, Westmoreland.*

Solicitors for other parties: Messrs. *Hunter, Gwatkin, & Hunter;* Messrs. *Markby, Wilde, & Burra.*

(1) 1 J. & Lat. 662.

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July 16, 29, 30.

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[1871 W. 98.]

Partnership—Misconduct—Return of Premium.

Where a partnership is determined prematurely, if the incoming partner has paid a premium he is in all cases entitled to have a proportionate part of the premium returned, except, first, where there has been actual or implied release or waiver of the right to it; or, secondly, where there has been actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether.

Mere conduct entitling the other partner to a dissolution is not sufficient, inasmuch as this Court does not fine for immorality or even dishonesty in the abstract.

By articles of partnership dated the 1st day of June, 1869, the Plaintiff, a young man twenty-two years of age, and without any experience of business transactions, entered into partnership with the Defendant, who had for many years carried on the business of a wine merchant in *Fenchurch Street, London,* and which business he represented as producing a net annual income of from £1200 to £1400.

The premium paid by the Plaintiff was £2500; he also paid for the stock and office furniture, £626 14*s.* 6*d.*; for half the value of the lease, £362; for share of capital, £500.

The partnership was for a term of seven years from the 1st of June, 1869; and by the 5th article each partner was to be at liberty to draw out £50 a month for his own use. There was the usual provision for arbitration in case of difference, and in other respects the articles were in the ordinary form. The partners commenced business on the 1st of June, 1869, but during the first month the Defendant suggested that the business required more capital, and that neither partner should for the first six months draw any money out of the business. On the 28th of November, 1870, the Defendant pointed out that the lease would expire on the 29th of September, 1875, and the partnership on the 1st of June, 1876, and requested the Plaintiff to consent to have the

partnership reduced to the same term as the lease on the ground that it would be better for both of them. To this the Plaintiff consented, and a memorandum was indorsed on the deed to that effect. The Defendant alleged that in July, 1870, he had reason to be dissatisfied with the Plaintiff's conduct, and his complaint was as follows:—

That the Plaintiff had drawn seventeen cheques in the name of the partnership, and applied the proceeds to his private debts.

That he induced neighbours to discount for private debts his acceptances, which were afterwards dishonoured, and the credit of the firm thereby damaged.

That he borrowed money from workmen and shopmen in the employment of the neighbours, and obtained goods in the Defendant's name for which he (Defendant) had to pay.

That he had received debts due from customers of the firm which he had applied to his own use, and that the Defendant, being ignorant of the fact, had applied for payment and then discovered what had taken place.

That the list of debtors to the firm on the 16th of March, 1871, made out when the books were balanced by him in March, 1871, contained the list of several debtors whose debts had been received by the Plaintiff.

The Defendant further alleged that in February, 1871, he was informed by a youth named *Thomas Ratcliffe*, in the employment of the firm, that the Plaintiff had induced him to make out and sign a fictitious receipt to a tradesman's bill. The Defendant thereupon instructed his solicitors to require the Plaintiff to sign a dissolution of the partnership (which they did under threat of a Chancery suit). On the 16th of March, 1871, the Plaintiff signed the notice, which the Defendant next day caused to be inserted in the *London Gazette*.

The Plaintiff in answer to these charges admitted that in consequence of being unable to draw any money from the business (contrary to the partnership articles) he had on one or two occasions used for his own expenses a cheque drawn on the firm. He denied that he had ever, except on six occasions, received any of the debts due to the firm. He admitted that he had requested *Ratcliffe* to sign a receipt for a bill for £16 6*s*., in order to make

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his wife believe that he had paid it. She had obtained the money from her father and given the money to the Plaintiff in order to pay the bill. He had paid £10, but being pressed for money had appropriated the balance to his own use.

The Plaintiff prayed that the Defendant might be directed to repay to him a fair proportionate part of the premium, regard being had in ascertaining such fair proportionate part to the difference between the actual net profits of the business and the sum of £1200 or £1400 per annum so represented by the Defendant as the net annual value, and also regard being had to the actual duration of the partnership, and the term (seven years) for which it was originally agreed; for accounts; for application of the assets after paying debts in or towards the liquidation of the capital brought into the partnership by the partners, and for payment by the Defendant of what should be found due from him to the Plaintiff; for inquiries and further relief: and the Plaintiff also prayed for the appointment of a receiver, with directions to sell the lease of the premises; and for an injunction.

Mr. *Morgan*, Q.C., and Mr. *G. W. Collins*, for the Plaintiff, after reading the evidence, contended that the Defendant had no ground to complain of the Plaintiff's conduct, inasmuch as the Plaintiff's slight irregularities were caused by the Defendant himself in not allowing him to draw any income from the partnership. They submitted that the case came within the principle of the decisions in *Astle* v. *Wright* (1), and *Atwood* v. *Maude* (2).

They also cited *Snow* v. *Milford* (3); *Featherstonhaugh* v. *Fenwick* (4); *Tattersall* v. *Groote* (5); *Bury* v. *Allen* (6); *Hamil* v. *Stokes* (7); distinguished this case from *Lee* v. *Page* (8), and submitted that the most that the Plaintiff did was to receive some moneys, and not give credit for them in the proper book of the partnership, and that that made him merely a debtor to the partnership; and they asked for a decree in the terms of the prayer of the bill.

(1) 23 Beav. 77.
(2) Law Rep. 3 Ch. 369.
(3) 16 W. R. 554.
(4) 17 Ves. 298.
(5) 2 B. & P. 131.
(6) 1 Coll. 589.
(7) 4 Price, 161.
(8) 7 Jur. (N.S.) 768.

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Mr. *Eddis*, Q.C., and Mr. *Speed*, for the Defendant, contended that the bill, so far as it sought a return of any premium, ought to be dismissed with costs; that there was no dispute as to the law, which was in effect that in the case of a contract like this, if one of the partners chose to violate the terms of it, he was not entitled to any indulgence: *Atwood* v. *Maude* (1); *Astle* v. *Wright* (2). The rules of equity were as strict as those at law; and the partner in this case who was guilty of the violation of the contract, and who committed the wrong, was not entitled to any apportionment of the premium. The Plaintiff, who paid a premium, was the partner who broke the contract, and he could not, without a violation of the rules of the Court, be allowed to recover a part of the premium, and thus entitled to take advantage of his own wrong. The real question was, which of the partners had violated the contract; and they submitted that it was the Plaintiff. In all the cases where any premium had been directed to be returned there had been misconduct on the part of the partner who had received the premium; but in this case the Defendant had done no wrong, They cited and commented upon *Burdon* v. *Barkus* (3), *Airey* v. *Borham* (4), *Pease* v. *Hewitt* (5), *Akhurst* v. *Jackson* (6), *Freeland* v. *Stansfeld* (7), *Featherstonhaugh* v. *Turner* (8), and *Lee* v. *Page* (9).

SIR JOHN WICKENS, V.C.:—

This case must be determined according to authorities which, I confess, I cannot reconcile in a manner quite satisfactory to my mind; but I think I can decide it without trenching upon any one of them. In general an incoming partner, who buys with a premium a partnership for a term of years, and does not get the full benefit for which he contracted, because the partnership is prematurely dissolved by this Court, is entitled to have a portion of the premium returned; and the Court, I believe, has always treated it as a mere arithmetical question, but it might well have been treated in another way. The dissolution by the Court is a varia-

(1) Law Rep. 3 Ch. 369.
(2) 23 Beav. 77.
(3) 4 D. F. & J. 42.
(4) 29 Beav. 620.
(5) 31 Beav. 22.
(6) 1 Sw. 85.
(7) 2 Sm. & Giff. 479.
(8) 25 Beav. 382.
(9) 7 Jur. (N.S.) 768.

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tion of the contract which the Court imposes on the parties, and the Court, in so imposing it, generally treats the premium as if it were an aggregate of yearly payments made in advance, and returns to the payer the proportion attributable to that part of the term which it cuts off from that contracted for. The right of the purchaser who paid the premium, like every other right, may, of course, be waived or forfeited. One peculiar and perfectly intelligible sort of waiver is where the person who has paid a premium expressly or by implication releases his right to the return of it. I cannot consider that the case of *Lee* v. *Page* (1), which has been relied on for the Defendant, is a case of that class at all. In *Lee* v. *Page*, as I understand it, the circumstances from which the equity is derived—the premature dissolution by the Court as distinguished from premature dissolution by contract—did not occur. In this case, as I read the correspondence and the transaction, the parties, for the sake of avoiding litigation, submitted, as it were, to a decree for dissolution out of Court, but reserving to the payer of the premium (the Plaintiff in this case) the same rights as he would have had if the Court had determined that prematurely on a bill filed. Another case, which is much more difficult to deal with, is such a repudiation of the partnership contract on the claimant's part as amounts to a wilful and deliberate throwing up of his rights as partner. That may be by conduct, or it may be, and perhaps more generally is, as in the case at the Rolls, mere neglect. I consider that absenting himself from the partnership, and refusing to act as a partner, or to perform the functions of a partner, or to be a partner in fact, may be considered, and not unfairly, as repudiating the partnership. A third case, which is either analogous to or identical with the second, is recognised by the authorities where the claimant has been guilty of gross misconduct, necessitating the dissolution of the partnership contract. Unfortunately there is nothing, I think, in the authorities to define what misconduct would be gross enough for this purpose. You may find it in cases where it has been held it is gross enough, but it is never defined in principle, and it is extremely difficult to find a principle by which it can be defined. This Court does not punish people by fining them for acts of immorality in the abstract, nor even fraud in the abstract; it does not take away their pecuniary rights on

(1) 7 Jur. (N.S.) 768.

that ground. A partner however erring does not forfeit his right to share in the assets, although he may have committed every sort of atrocity during the partnership, and there may be a suit by his co-partner which is unavoidable, and cannot be resisted in any way. However fraudulent or however bad he may have been, he does not by that merely forfeit a right to a share in the partnership assets; nor, I believe, if the premium were reserved in the way of yearly rent during the term, would it be possible for the Court in any way to direct that the partnership should cease, but that future payments of the premium should go on. Suppose a man had paid £10,000 for ten years' premium, and at the end of the first year committed a pecuniary fraud unconnected with the business of the firm, and that he was prosecuted and imprisoned for it, this might, and probably would, entitle the other partner to a decree for dissolution of the partnership; but it is extremely difficult to say that that would be misconduct which this Court would punish by forfeiting the other £9000 for the benefit of the partner who got himself released. It seems to me that on principle the only case in which the return of premium ought to be refused, where there is a premature dissolution by the Court, or what is tantamount to a premature dissolution by the Court, is either where there has been an actual or implied release of the right to the premium, or an actual or implied release of the right to be a partner, including under the latter head such a deliberate and serious breach of the partnership contract as might be considered equivalent to a repudiation of it altogether. Mere conduct entitling the other partner to a decree for dissolution would not, I think, on principle, be sufficient, although without such conduct the right could not arise. The mere overdrawing, for instance, would not be enough, nor mere carelessness in keeping accounts, nor mere breach of a contract not to give credit, or the like, unless so deliberate, so continued, and so persisted in after warning, as to amount to a determination to treat the partnership articles as a nullity. He who acts so as to shew that he treats the articles as a nullity as regards his own obligation, cannot complain if they are so treated for all purposes; and this consideration might apply even more strongly when the Court can see a deliberate intention on the part of the partner who paid the premium to get back

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the premium and slip out of the partnership. In such a case, I have no doubt whatever he would waive his right to the partnership, and, therefore, his right to a return of the premium. I repeat that it seems to me that, on principle, not every breach of contract by the claimant of a return of premium which would entitle the other partner to a dissolution, would entitle the latter, although perfectly innocent, to refuse a return of the premium. No doubt there are expressions used by Lord *Cairns* in *Atwood* v. *Maude* (1) which may seem hardly consistent with that; but it must be remembered—as I do, paying every attention to authority—when the decision of Lord *Cairns* is invoked, that he was reversing a decision against the claimant on the ground of misconduct, and shewed, as to each ground of misconduct, that it was insufficiently proved, or failed in some way; and I think it would be too much to hold that he necessarily decided that if the things which he held not to have been proved had been proved they would have been sufficient to justify the decree below, although he did not go beyond what was necessary for the decision. Still, I should feel great difficulty—indeed, I should feel it impossible after what was said in *Atwood* v. *Maude*—to act on my own views of what the principle ought to be, and what I think at some time or another will be the principle. But, independently of anything in which I may appear to dissent from the *dicta* in *Atwood* v. *Maude*, it seems to me not difficult to deal with the principal point in the present case. I think that the reduction of the term from seven years to six and a quarter, or six and one-third years, by the memorandum of the 28th of November, 1870, was an agreement by the Plaintiff to waive his rights of partnership as regards the last eight or nine months. I see no sufficient reason to believe that the reduction was intended by either of the parties to affect the question of premium; but unless I could see that it was obtained from the Plaintiff by fraudulent or improper means, or without his sufficiently understanding what it was (as distinguished from the indirect legal effect of it), it would be wholly unsafe to treat it as a nullity for the present purpose. But I think as regards the other questions arising on the premium the Plaintiff's case succeeds. The dissolution was, I think, so made as to leave the question of the return of the premium open, and to be dealt with on the same

(1) Law Rep. 3 Ch. 369.

principles as if the partnership had been put an end to by a decree for dissolution by the Court at the Defendant's suit, and not to conclude it, as was done in *Lee* v. *Page* (1). With regard to the merits of the case, I hold that the Plaintiff's conduct, as his own counsel have admitted, was utterly unjustifiable, and in a very high degree wrong as regards the receipt, although I have no doubt that he and his friends give a true account of his motives, and, in fact, of the nature of the transaction; and the fact that the boy who was misled was a boy in the office of the firm hardly seems to me to connect it so directly with the partnership business as to make it, in so far as it was a fraud, a fraud on the Defendant; but it was undoubtedly a very foolish act, and worse than a very foolish act. It was an act in every respect unjustifiable. Still, it is important that a proper measure of moral indignation and punishment should be awarded, more or less, and not an improper and wild measure of revenge.

As regards the other matters complained of, the Plaintiff's conduct was so grossly careless that he can hardly complain if it is represented as fraudulent, although fraudulent in any true sense I think it was not. It does not seem to me that what was done by the Plaintiff in this case compelled a dissolution. I do not feel sure that the Defendant would have obtained a decree for a dissolution if he had filed a bill to get one; but at any rate, I think it would be most unfair and unjust to treat the Plaintiff's conduct, however objectionable in the abstract, as being sufficient to deprive him of his right to a return of the premium. Therefore I hold him to be entitled to a return of an aliquot part of the premium corresponding to the fraction of the term which never came into existence according to the dissolution.

There will be no costs up to the hearing, but there must be an inquiry as to any and what occupation rent ought to be charged against the Defendant in respect of his occupation of the premises and fixtures since the 16th of March, 1871. The lease, which is a partnership asset, must be sold and the proceeds come into the account; and the Plaintiff is entitled to interest at 4 per cent. on the premium from the time of dissolution, the 16th of March.

Solicitors for the Plaintiff: Messrs. *Monckton & Co.*

Solicitors for the Defendant: Messrs. *Wilkins, Blyth, & Marsland.*

(1) 7 Jur. (N.S.) 768.

C. J. B.
1873
July 7, 14.

Ex parte HAMMOND.
In re HAMMOND AND NEVARD.

Partner—Separate Liquidation—Order of Discharge—Release from Joint Debts—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 49, 50, 102, 103, 104, 105, 125—*Bankruptcy Rules*, 1870, *rr.* 285, 286, 287.

Under the *Bankruptcy Act*, 1869 (as under the former Bankruptcy Acts), an order of discharge granted to a debtor, who is one of a partnership firm, in his separate bankruptcy or liquidation, releases him from his joint as well as from his separate debts.

THIS was an appeal from a decision of the Judge of the County Court at *Greenwich*.

Abraham Hammond and *Nathan Nevard* each carried on business separately as builders. They were also engaged in a joint building speculation on the *College Park* estate at *Lewisham*. On the 1st of June, 1872, *Hammond* alone filed a liquidation petition in the *Greenwich* County Court. On the 12th of August, 1872, the creditors resolved upon a liquidation by arrangement, and appointed *B. Giles* and *G. H. Chapman* trustees of the debtor's property. The creditors also resolved—"That the trustees be and they are hereby authorized to sell all the assets and estate of the said *Abraham Hammond* to *John Thomas Green* for the sum of £1550, to be paid by him upon the execution by the trustees to him of a conveyance and assignment of such assets and estate." "That out of the said sum of £1550 the trustees pay all such costs of these proceedings as are unpaid, and that the residue of the said £1550 be divided rateably among the creditors (other than the said *J. T. Green*) whose proofs of debt shall upon investigation be established." These resolutions were duly registered. *Stephen E. Featherstone* was the holder of three acceptances for sums amounting to £764 3*s.* 6*d.*, which were signed by *Hammond* and *Nevard*, and for these he tendered a proof in the liquidation against *Hammond's* separate estate. He included in the same proof some other bills which had been accepted by *Hammond* alone, and he voted by proxy at the meetings of the creditors in

respect of his proof. The trustees, on the 5th of December, 1872, gave notice to *Featherstone* that they rejected his claim against the separate estate of *Hammond* to the extent of the £764 3*s.* 6*d.* represented by the joint acceptances. *Featherstone* applied to the Court to admit his claim, and his application was, on the 3rd of January, 1873, refused, on the ground that the debt created by the three acceptances was a joint one. On the 27th of January, 1873, *Featherstone* served *Hammond* and *Nevard* with a debtor's summons for the £764 3*s.* 6*d.*; *Hammond* then applied to the Court for an order to dismiss the summons, on the ground that neither he nor the late firm of *Hammond* and *Nevard* was indebted in the amount claimed by the summons. This application was, on the 13th of February, 1873, refused by the Judge. Meanwhile, on the 24th of January, 1873, a petition for adjudication of bankruptcy against *Nevard* alone had been filed by another creditor. On the 4th of February *Nevard* was adjudicated a bankrupt on this petition, and on the 21st of February a trustee of his estate was appointed. On the 24th of February a meeting of the creditors under *Hammond's* liquidation was held (in pursuance of a notice dated the 15th of February), and a special resolution was passed granting him his discharge. On the 18th of February, 1873, *Featherstone* filed a petition for a joint adjudication of bankruptcy against *Hammond* and *Nevard*. This petition was founded upon the commission of a joint act of bankruptcy by non-compliance with the requirements of the debtor's summons. The petition was not served on *Hammond* till after his order of discharge in the liquidation had been granted to him. On the 19th of March a joint adjudication was made on this petition. The learned Judge (Mr. *Pitt Taylor*) thought that the Act of 1869 had introduced a change in the law, and that when sect. 49 (after mentioning certain debts from which an order of discharge shall not release the bankrupt) goes on to say that it shall release a bankrupt "from all other debts proveable under the bankruptcy" (with two specified exceptions), it must be taken to mean all those debts which, when proved, will entitle the creditors at once to receive a rateable share of the assets. His Honour thought that if *Hammond* was discharged from the joint debts by virtue of the discharge in his separate liquidation, the

C. J. B. 1873 — *Ex parte* HAMMOND. *In re* HAMMOND AND NEVARD.

result would be that if his partner had also obtained his discharge in a separate liquidation the joint creditors would be unable to recover their debts out of the joint estate, though it might be ample for their payment, unless a joint adjudication could be made.

From this decision *Hammond* appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

Under the old law it is quite clear that a separate certificate or discharge granted to one partner in a firm released him from the joint as well as from his separate debts: *Ex parte Yale* (1); *Aflalo* v. *Fourdrinier* (2); *Grace* v. *Heyam* (3); *Ex parte Young* (4). There is no intention manifested in the Act of 1869 to alter the law in this respect; the only difference is, that the words "proveable under the bankruptcy" have been added, but of course those words must always have been implied before. Sect. 50, when it says that an order of discharge shall not release the bankrupt's partner, implies that it will release the bankrupt from the joint debts. Sect. 105 enables the trustee under a separate bankruptcy to get in the joint estate.

[They referred also to the *Bankruptcy Act*, 1869, ss. 102, 103, 104; *Ex parte Isaac* (5); *Ex parte Mills* (6); *Ex parte Dorman* (7).]

Mr. *Bagley*, for the trustees of *Hammond's* estate.

Mr. *Roxburgh*, Q.C., and Mr. *R. Vaughan Williams*, for the petitioning creditor, *Featherstone*:—

The Petition was presented before the order of discharge had been granted to *Hammond* in his liquidation; when it was presented there was a good joint act of bankruptcy, and nothing to release either partner from the joint debt. There may be a good debt to support a bankruptcy petition, even though the debt be barred for other purposes: *Watson* v. *Humphrey* (8). We do not dispute that under the old law the certificate released a partner from joint as well as from separate debts. But at that time there was a personal liability with regard to all debts, which liability is

(1) 3 P. Wms. 24, n.
(2) 6 Bing. 306.
(3) FitzGib. 281.
(4) 2 Rose, 40.
(5) Law Rep. 6 Ch. 58.
(6) Ibid. 594.
(7) Ibid. 8 Ch. 51.
(8) 10 Ex. 781.

now abolished. We contend that, in the administration of assets, a separate discharge is no bar to a proceeding taken for the purpose of realizing the joint estate. This was the view taken by the County Court Judge. Under the old law a joint creditor had a right to a joint as well as to a separate adjudication, and sect. 98 of the Act of 1849 (12 & 13 Vict. c. 106) provided for the consolidation of different petitions against members of the same firm.

The provisions made by sect. 102 of the present Act for consolidation are somewhat different; and, moreover, there is no provision for consolidating a liquidation and a bankruptcy. Sect. 105 does not compel the trustee under the separate liquidation to realize the joint estate, and the terms of the resolution of the creditors in this case would not authorize him to do this.

[SIR JAMES BACON, C.J.:—The separate estate includes the debtor's interest in the joint estate.]

At any rate, it was competent to the County Court Judge to say that there should be a joint adjudication, if he thought it more convenient. In *Ex parte Pemberton* (1) it was held to be a matter of course to annul a separate adjudication in favour of a joint one. The Rules of 1870 evidently contemplate that there may be a joint adjudication and discharge after a separate one: Rules 285, 286, 287. Under rule 285 a discharge granted by the separate creditors of one partner in a firm who had jointly petitioned for liquidation would clearly not release the joint estate. What difference can it make that proceedings have been taken by the partners separately instead of jointly?

SIR JAMES BACON, C.J.:—

It has been argued that some change has been made in the law by the Act of 1869 as to the effect of an order of discharge granted to one partner, and the learned County Court Judge thought that the law is in this respect different from what it formerly was. There can be no doubt whatever that if one of two joint debtors became bankrupt all his interest in the joint estate vested in his assignee. The joint creditors had a right to share in the joint

(1) 1 M. D. & D. 190.

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estate which was received by the assignee; but they had no right to touch the separate estate until the separate creditors had been paid. That was the law which existed for a great number of years. Has the new Act introduced any change? The new Act has altered the mode of administration by giving to the creditors a greater power of supervision, but that is all. The Act of Parliament is my sole guide; beyond it I cannot go. It has said in the plainest terms that the old law with regard to joint and separate estates shall continue to apply. By sects. 14 and 15 all the property of a bankrupt vests in his trustee; and by sect. 125, sub-sect. 7, the trustee under a liquidation has the same rights as the trustee under a bankruptcy. The effect of the liquidation is to take out of the debtor every particle of his property, while at the same time he gets discharged from all his debts. By the express terms of the Act joint debts are proveable under a separate liquidation. In what way are the joint creditors prejudiced in the present case? The County Court being asked to adjudicate these debtors jointly bankrupt, one of them answers, "The debt alleged to be due from me is not due; I am already discharged from it, and there is no reason why I should be adjudicated a bankrupt, for by means of sect. 102 the creditor has an ample remedy under the existing proceedings." If an adjudication is made against one partner alone the joint creditors are entitled to have every farthing of the joint estate administered. It is useless to spell out the old Acts of Parliament or the new rules, none of which can countervail the plain provisions of this Act. You cannot make a man a bankrupt who does not owe a debt, and the Appellant is entitled to say, "I do not owe any debt; I am discharged from all my debts." Nor is there any such danger as the County Court Judge thought would arise. The joint estate remains as much liable to the joint debts as it ever was. There is nothing in the rules 285 and 287 which tends to shew that the general enactments of the statute are to be departed from. Rule 285 applies to the case of all the partners in a firm jointly petitioning; rule 287 applies to the case of one partner petitioning alone. It has been suggested that the release given by an order of discharge is only a personal matter, and that it does not apply to proceedings for administration of assets. I can find no such distinction; the

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words of the Act are positive. *Hammond's* discharge has not released the joint estate from the joint debts. He has complied with the requirements of the law; and if I were to hold that he is not discharged from all his debts, I should be throwing a doubt on the meaning of the statute where none exists. I am clearly of opinion that where an order of discharge has been granted to one of two joint debtors in his separate liquidation, a joint adjudication of bankruptcy against him cannot be supported.

Solicitors for the Appellant and for the Trustee: Messrs. *Halse, Trustram, & Co.*

Solicitors for the Petitioning Creditor: Messrs. *Bellamy, Strong, & Edgelow.*

Ex parte GREENWAY. *In re* ADAMS.

C. J. B.
1873
July 21.

Secured Creditor—Garnishee Order—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 62—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*sub-s.* 5), 95.

A creditor of a liquidating debtor who before the presentation of the Petition has obtained a garnishee order affecting money accruing due to his debtor, but who has not obtained any order for payment by the garnishee, is not a secured creditor within the meaning of the *Bankruptcy Act*, 1869.

THIS was an appeal from a decision of the Judge of the County Court at *Bristol.*

Abraham Adams and *William Kirby* were contractors. On the 28th of November, 1872, they filed a liquidation petition, and on the 19th of December the creditors resolved on a liquidation, and appointed a trustee. On the 12th of November, 1872, *Frederick Greenway* had recovered final judgment in the Tolzey Court of *Bristol* against the debtors for £38 9*s.* 6*d.* At this time the *Bristol United Gas Company* had in their hands a sum of £413 18*s.*, the balance remaining due to the debtors upon a contract for work performed by them for the company. By the terms of the contract this sum was to be retained by the company after the completion of the work, and was not to become payable to the debtors until February, 1873. On the 14th of November *Greenway* issued under

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his judgment an order of attachment and garnishee summons against the gas company, to attach the moneys in their hands due or accruing due to the debtors. On the 18th of November, upon the hearing of this summons in the Tolzey Court, the order for attachment was confirmed, but as it appeared that the debt attached was not payable for nearly three months no order for payment by the garnishees was made. On the 16th of December the trustee under the liquidation (who had at that time only been appointed receiver) applied to the County Court for an injunction to restrain *Greenway* from proceeding further under his judgment or under the attachment. The hearing of this application was adjourned till the 21st of December, and on that day the motion was dismissed with costs, leave being given to the trustee to apply again to the Court to have the attachment set aside if he should be so advised. On the 24th of March, 1873, on the application of *Greenway*, an order was made by the Tolzey Court that the garnishees should forthwith pay to him the debt due from them to *Adams* and *Kirby*, or so much thereof as might be sufficient to satisfy *Greenway's* judgment debt and costs, and that in default thereof execution might issue for the same. On the 29th of March an *ex parte* application was made by the trustee to the County Court for an injunction to restrain *Greenway* from taking any further proceedings under the attachment. The Registrar declined to grant an *ex parte* injunction, and required notice to be given to *Greenway*. The same day he issued execution against the gas company for his debt and costs, and the sum of £43 13*s*. was paid to him by the gas company. On the 16th of May the Judge of the County Court made an order upon *Greenway* to repay this sum to the trustee under the liquidation.

From this order *Greenway* appealed.

Mr. *Winslow*, for the Appellant:—

The matter was really *res judicata* by virtue of the order made by the Tolzey Court on the 24th of March, which was never appealed from. If that order binds, as it does, the rights of third parties, it must bind the rights of the judgment debtor, and of all those who claim through him: *Langmead* v. *Maple* (1). Then I

(1) 18 C. B. (N.S.) 255.

say that by virtue of the garnishee order the Appellant is a secured creditor within the meaning of the *Bankruptcy Act*, 1869, sects. 12, 16 (sub-sect. 5), and is protected by sect. 95: *Ex parte Rocke* (1). In *Holmes* v. *Tutton* (2), which was a decision on sect. 184 of the *Bankruptcy Act*, 1849 (12 & 13 Vict. c. 106), it is plain from the judgment of the Court of Queen's Bench that if the word "charge," which is in sect. 16 of the Act of 1869, had been in sect. 184 of the Act of 1849, the decision would have been in favour of the creditor. The insertion of the word "charge" in the Act of 1869 shews that it was intended to extend the rights of secured creditors.

Mr. *Bagley*, for the trustee, was not called upon.

SIR JAMES BACON, C.J.:—

I have listened with great interest to the argument in support of this appeal, because it introduces something quite novel. If I were to accede to it I should contravene the principle and even the very words of the Act of Parliament. None of the observations which have been read from other cases in any way favour the contention which has been raised to-day. *Ex parte Rocke* recognises sect. 184 of the *Bankrupt Law Consolidation Act*, 1849 (12 & 13 Vict. c. 106), as being now repealed, and a new provision substituted for it. That case, however, turned upon this, that the seizure had been made without notice of any act of bankruptcy committed by the debtor. But the judgments of the Lord Chancellor and the Lords Justices shew that they considered that it was not the intention of the *Bankruptcy Act*, 1869, to enlarge the rights of execution creditors, or, on the other hand, to diminish the rights which they had already obtained. I cannot follow the argument that in the present case the law of bankruptcy was extinguished by the proceedings which took place in the Tolzey Court on the 24th of March. As to sect. 12 of the Act, it contains a proviso that it shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed.

(1) Law Rep. 6 Ch. 795. (2) 5 E. & B. 65.

C. J. B. 1873 *Ex parte* GREENWAY. *In re* ADAMS.

The words are holding (not having) a security. It would be not merely a straining but a perversion of those words to say that a creditor who has only obtained a garnishee order is a creditor "holding a security." Then by sect. 95 any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, is to be valid against the trustee if the creditor had no notice of an act of bankruptcy at the date of the seizure and sale. What, then, are the dates in this case? Up to a certain date the proceedings in the Tolzey Court were entirely in favour of the judgment creditor. Then on the 19th of December the creditors' resolution in favour of liquidation was passed, and a trustee was appointed, and thereupon all the property of the debtor, including the debt which the gas company owed him, became vested in the trustee. What took place afterwards cannot alter the operation of the law. From that time the property was vested in the trustee for distribution among all the creditors equally. The judgment of the County Court Judge states very clearly what the law is. He expresses his opinion that the order of the Tolzey Court, of the 24th of March did not make the Appellant a creditor holding security within the meaning of sect. 12 of the Act. The learned Judge referred also to sub-sect. 5 of sect. 16, which says that "a secured creditor shall in this Act mean any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him." It is impossible to wrest those words so as to make them mean what is now contended for. There was no attempt to seize this debt except under the order of the Tolzey Court of the 24th of March, 1873, which was made several months after the property had vested in the trustee. It is impossible to say that any property could be then acquired by any order made in the Tolzey Court. By the execution issued against the gas company the creditor simply possessed himself of money which belonged to another person, the trustee, and he must refund it. The appeal will be dismissed with costs.

Solicitors for the Appellant: Messrs. *Jones, Blaxland, & Son,* agents for Mr. *John Miller, Bristol.*

Solicitors for the trustee: Messrs. *Walter, Moojen, & Son,* agents for Mr. *H. H. Beckingham, Bristol.*

In re BERGER.

C. J. B. 1873 July 28.

Liquidation—Registration of Resolution—Amount of Stamp Duty—Difference between Estimates made by the Debtor and by the Trustee of the value of the Assets—Order Regulating Fees of 10th August, 1871, Table A.

A debtor filed a liquidation petition, and in his statement he estimated his assets at £4660. The creditors resolved on a liquidation. When the trustee presented the resolution for registration he had made an affidavit in which he stated that he believed the assets would not realize more than £1000, and he had only paid stamp duty on £1000. It did not appear that the value of the assets, as estimated by the debtor, would be more than enough to pay the creditors in full:—

Held, that stamp duty must be paid on the amount of the debtor's estimate.

Ex parte Murray (1) explained.

ON the 14th of May, 1872, *Charles Francis Berger*, a merchant, filed a liquidation petition. In his statement his assets were estimated as worth £4660 12*s.* 3*d.* On the 5th of June the creditors resolved upon a liquidation, and appointed a trustee. When the resolution was presented to the Registrar for registration, it appeared that the trustee had made an affidavit, in which he stated that the greater part of the assets consisted of debts due to *Berger* from persons resident abroad, and overdue bills of exchange. The trustee further deposed: "After inquiries made by me, and from my knowledge of the transactions of the said *C. F. Berger* and the nature of the debts owing to him, I verily believe that such assets will not realize the sum of £1000, but if the same should exceed that amount, I undertake to pay the proper stamp duty on the excess amount." The stamp duty on £1000 only had been paid. There was nothing to shew that the amount of the debtor's estimate exceeded the sum which would be necessary to pay the creditors in full. Under these circumstances the Registrar refused to register the resolution, and the matter was referred to the Chief Judge.

Mr. *John Linklater*, for the trustee:—

The trustee's estimate, made, as he deposes, after inquiry as to

(1) *Ante*, p. 215.

C. J. B. 1873 *In re* BERGER.

the nature and value of the assets, ought to be accepted in preference to that of the debtor as the reasonable meaning of "estimated assets" in the Order of the 10th of August, 1871. This would be in accordance with the decision in *Ex parte Murray* (1), where it was held that a trustee having deposed that a certain sum only, which was much less than the value of the assets as estimated by the debtor, would be required to pay the creditors in full, stamp duty should be paid upon that sum only.

No one appeared in opposition to the motion.

SIR JAMES BACON, C.J.:—

What I said in *Ex parte Murray* has been misunderstood. The law on this subject is plain. In *Ex parte Murray* the assets were enough to pay the debts twice over. The trustee's affidavit shewed that a certain sum would be sufficient to pay the creditors in full, and what I said was that the stamp duty was not to be paid on any sum but that which was required to pay all the creditors in full. It would lead to almost uncontrolled abuses if I were to adopt the view which has now been pressed upon me, if the trustee's mere guess as to the value of the assets were to be necessarily adopted. There is no such question now as that which arose in *Ex parte Murray*, and I think that the Registrar cannot register the resolution until the duty has been paid upon that sum which the debtor has stated as the value of his assets.

Solicitors: Messrs. *Linklater, Hackwood, & Co.*

(1) *Ante*, p. 215.

Ex parte HOARE. *In re* WALTON.

C. J. B.
1873
August 4.

Liquidation Petition—Resolution to accept Composition—Subsequent Adjudication—Act of Bankruptcy—Notice—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 95, 126—*Bankruptcy Rules*, 1870, *rr.* 266, 267.

On the 12th of November a debtor filed a liquidation petition. The creditors resolved to accept a composition. The debtor failed to pay it when due, and on the 28th of May he was adjudicated a bankrupt upon a petition filed on the 29th of April, the act of bankruptcy being the filing of the liquidation petition. On the 29th of March he had executed a mortgage of some leasehold property, in substitution for a mortgage, given to the same creditor two years before the liquidation petition was filed, of a lease which afterwards turned out to be void:—

Held (reversing the decision of the County Court Judge), that though, when the mortgage of the 29th of March was executed, the mortgagee had notice of the filing of the liquidation petition, yet it was not notice of an act of bankruptcy then available for adjudication against the debtor, and consequently that the mortgage was protected by sect. 95 of the *Bankruptcy Act*, 1869.

THIS was an appeal from a decision of the Judge of the County Court at *Barnet*.

On the 12th of November, 1872, *Zachariah Walton*, a licensed victualler, filed a liquidation petition. At the first meeting of his creditors, held on the 12th of December, it was resolved that a composition of 5*s.* in the pound should be accepted, for which promissory notes were to be given, and a trustee was appointed to distribute the promissory notes and the composition, when payable, among the creditors. The resolution was confirmed at a subsequent meeting of the creditors on the 24th of December. The debtor failed to pay the composition when it became due, and on the 29th of April, 1873, a petition for adjudication of bankruptcy against him was presented, the act of bankruptcy alleged being the filing of the liquidation petition. On the 28th of May the debtor was adjudicated a bankrupt, and *Sydney Smith* was appointed trustee.

On the 3rd of October, 1870, a public-house at *Barnet* called the *Warwick Tavern* was demised by *Samuel Walton* to *Zachariah Walton* for the term of fifty years from the 29th of September,

C. J. B. 1873 *Ex parte* HOARE. *In re* WALTON.

1870, at a yearly rent, and subject to certain covenants; and on the 6th of October, 1870, *Zachariah Walton* mortgaged this lease by way of underlease to *Isabella Elizabeth Hoare*, as a trustee on behalf of Messrs. *Hoare & Co.*, brewers, to secure the repayment of £400 then lent to the mortgagor by the Messrs. *Hoare*, and further advances, not exceeding in the whole £600. In the year 1872 an action of ejectment was commenced in the Court of Common Pleas against Mrs. *Hoare* by some persons who claimed to be mortgagees in fee of the *Warwick Tavern* under a mortgage executed by *Samuel Walton* prior to the lease. Mrs. *Hoare* was advised that she had no defence to the action, and in February, 1873, she entered into an arrangement with the Plaintiffs in the action for a compromise, on the terms that a new lease of the *Warwick Tavern* and of some adjoining cottages should be granted by them to *Zachariah Walton*, and that, on the acceptance of the new lease by him, Mrs. *Hoare* should pay certain costs to the Plaintiffs in the action. It was also agreed between Mrs. *Hoare* and *Zachariah Walton* that on the new lease being obtained he should execute a mortgage of it to her to secure what was due to her on the former mortgage. On the 28th of February, 1872, the Plaintiffs in the action executed a lease of the *Warwick Tavern* and the cottages to *Zachariah Walton* for twenty-one years, from the 25th of December, 1872, and *Walton* accepted the lease, and thereupon Mrs. *Hoare* paid the costs as agreed. At this time the £400 secured by the mortgage of the 6th of October, 1870, with an arrear of interest, was due to Mrs. *Hoare*, and further sums were due to her on the security of that mortgage. On the 29th of March, 1873, *Zachariah Walton*, in consideration of £700 then due from him to Mrs. *Hoare*, assigned to her by way of mortgage all the premises demised by the lease of the 28th of February, 1873. Mrs. *Hoare* had notice of the filing of the liquidation petition, and of the subsequent proceedings.

On the 16th of July, 1873, on the application of the trustee under the bankruptcy, the Judge of the County Court made an order declaring the mortgage of the 29th of March, 1873, void as against the trustee, and at the same time the Judge dismissed a motion on the part of Mrs. *Hoare* asking that the mortgage of the 29th of March might be declared to be a valid and subsisting

mortgage, and that an account might be taken of what was due upon it, and that the premises might be sold, and that Mrs. *Hoare* might have the conduct of the sale. From these two orders Mrs. *Hoare* appealed.

Mr. *Little*, Q.C., and Mr. *Joseph Dixon*, for the Appellant:—

Composition differs from liquidation in that the object is to leave the debtor in possession of his property to deal with as he pleases. The resolution of the creditors to accept a composition nullifies the effect of the declaration of insolvency contained in the liquidation petition. The power given by sect. 126 of the Act to adjudicate the debtor a bankrupt is a discretionary power given to the Court, and Rules 266, 267, do not authorize the setting aside the determination come to by the creditors. Moreover, in this case the bankrupt was really a trustee of the new lease for the mortgagee, and the bankrupt had in his first mortgage entered into a covenant for further assurance.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for the trustee:—

According to the decision in *Ex parte Duignan* (1) the filing of the liquidation petition was an act of bankruptcy, and the title of the trustee relates back to it, avoiding all subsequent dealings with the property. The mortgagee had notice of the act of bankruptcy, and so long as the adjudication stands its effect cannot be questioned.

[The CHIEF JUDGE:—In *Ex parte Duignan* there had been no resolution of the creditors to accept a composition.]

The new lease vested in the bankrupt after the act of bankruptcy, and he could not deal with it so as to defeat the right of the trustee. The resolution of the creditors lost its value through the default of the bankrupt in fulfilling his part of the bargain. The mortgage, too, was given to secure an antecedent debt, and as to the covenant for further assurance contained in the original mortgage, the bankrupt, when he gave the new mortgage, was not capable of fulfilling his covenant.

(1) Law Rep. 11 Eq. 604; Ibid. 6 Ch. 605.

C. J. B. 1873 *Ex parte* HOARE. *In re* WALTON.

SIR JAMES BACON, C.J.:—

In my opinion these orders cannot be sustained. The question as to the act of bankruptcy may have to be considered on some future occasion. But in this case, though Mrs. *Hoare*, when she took her mortgage, had notice of the act of bankruptcy, she had also notice of the resolution of the creditors to accept a composition, the result of which was to leave the debtor the master of his property She had, therefore, when she took her mortgage no notice of any act of bankruptcy committed by the debtor that was available against him for adjudication, for it is admitted that if he had paid the composition the act of bankruptcy would not have been available against him for adjudication. What was done was done at a time when the debtor was, with the consent of all his creditors, a perfectly free agent. In that state of things a mortgage was taken which was a substitute for and an extension of the original mortgage, given before the liquidation proceedings were commenced. It was not a new security for an antecedent debt. I think that the mortgagee is entitled to what she asks, except that the trustee must have the conduct of the sale.

Solicitors for the Appellant: Messrs. *Symes, Sandilands, & Humphry.*

Solicitors for the Trustee: Messrs. *Lewis, Munns, & Longden.*

In re STRUTT'S TRUSTS.

V.-C. M.
1873
July 19.

Settled Estates Act (19 & 20 *Vict. c.* 120)—*Consent to Application for Sale—Unascertained Contingent Remaindermen—Trustee for Sale.*

A testator devised a freehold estate upon trust for his daughter for life, remainder to her husband for life, and after the death of the survivor upon trust to sell and stand possessed of the proceeds for all the children of his daughter who should be living at the death of the survivor of the daughter and her husband, and who should attain twenty-one, and also the issue then living, and who should attain twenty-one, of any child or children of the testator's daughter who should have previously died.

The testator's daughter had six children living, all over twenty-one, and one of them had two infant children:—

Held, that an order for sale under the *Settled Estates Act*, made with the concurrence of the testator's daughter and her husband, and the trustee for sale, and five of the children, was not invalid by reason of the non-concurrence of the infant children:

Held, also, that the trustee being before the Court, it was unnecessary to have the concurrence of any of the *cestuis que trust*.

THIS case came on upon adjourned summons on the following statement of facts:—

Jedediah Strutt, by a second codicil to his will dated the 25th of September, 1854, devised unto *G. H. Strutt* and *W. Evans*, their heirs and assigns, his *Woodeaves* estate, upon trust for the testator's daughter, *Marianne Fox*, for her life for her separate use, without power of anticipation, and after her death, in case her husband should survive her, upon trust for him for his life, and after the death of the survivor of *Marianne Fox* and her husband, upon trust to sell the said estate by public auction or private contract, with power to give receipts for the purchase-money thereof; and the testator declared that his trustees should stand possessed of the money to arise by any sale or sales, after payment of expenses, upon trust for all and every the child and children of the testator's said daughter *Marianne Fox* who should be living at the time of the death of the survivor of the testator, and of the said *Marianne Fox* and her husband, and who should attain the age of twenty-one years or marry, as tenants in common if more than one, and also the issue then living, and who should attain the age of twenty-one

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years or marry, of any child or children of the testator's said daughter *Marianne Fox* who should have previously died, either in the testator's lifetime or after his decease, such issue through all their degrees to take *per stirpes*, and if more than one as tenants in common, such share or shares only as his, her, or their parent, or respective parents, would have been entitled to if living.

In the event of Mrs. *Fox* and her husband dying without leaving a child or children, or the issue of a deceased child or children living at the death of the survivor of them, Mr. *G. H. Strutt*, the trustee, as the testator's residuary devisee, would be entitled to the property.

W. Evans, one of the trustees, disclaimed.

Mr. and Mrs. *Fox* were both living, and had had six children, all of whom were now living and had attained twenty-one. One of them, a daughter, was married to the Respondent, Mr. *Were*, and had issue two infant children; one of the sons was married, but had at present no child.

Mr. *G. H. Strutt*, the trustee, in November, 1872, contracted to sell the *Woodeaves* estate to Sir *William Fitzherbert*, subject to the approval and order of the Court, under the *Leases and Sales of Settled Estates Act*, and thereupon a petition under the Act was presented, in which Mr. *Strutt*, Mr. and Mrs. *Fox*, and five of their children, were the only Petitioners, for the purpose of obtaining the sanction of the Court to the contract, and of appointing a new trustee of the will and codicils so far as regarded the trust estate given to Mrs. *Fox*, her husband and issue. Mr. and Mrs. *Were* were made the only Respondents to the Petition, and Mr. *Were* accepted service of such Petition on behalf of himself and his wife, but neither of them appeared on the hearing of the Petition. An order was made on the 24th of January, 1873, approving this contract, and appointing Mr. *William Abney* a new trustee, and by such order liberty was given to the Petitioners to apply in Chambers as to any matters arising under the contract or otherwise in relation to the matters therein aforesaid.

On the hearing of the Petition the attention of the Court was called to the fact that Mrs. *Were*, and all persons, if any, other than the Petitioners, interested in the proceeds of the proposed sale,

were considered to be sufficiently represented, for the purposes of the *Leases and Sales of Settled Estates Act*, by the trustee.

A question had been raised upon the title, whether or not the order made upon that Petition was binding as against Mrs. *Were* and her children, the purchaser insisting that their interests were not affected by the order, while the vendors contended that their interests, or at any rate the interests of Mrs. *Were's* children, were sufficiently represented by Mr. *Strutt*. The purchaser had been advised that so far as Mrs. *Were* was concerned the concurrence of herself and her husband in the conveyance would bind her interest in the property, but that such concurrence would not, in the event of Mrs. *Were's* predeceasing her father and mother, the said Mr. and Mrs. *Fox*, bind her present children, and that they ought to have been represented on the Petition.

The purchaser being willing to appear and submit to the jurisdiction of this Court, a summons was on the 18th of March, 1873, taken out by the Petitioners and Mr. *Abney*, that the purchaser might be ordered, upon the due execution by all proper parties of a conveyance to him of the hereditaments comprised in the agreement of the 15th of November, 1872, in the Petition stated, to pay or secure his purchase-money, and such summons had been adjourned into Court.

Mr. *Lewin*, jun., for the trustees:—

The question for the Court to decide upon this summons is, whether all the necessary parties were before the Court when the order was made for sale under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120). The contract for sale has been entered into by the trustee on behalf of all parties, and Mr. and Mrs. *Fox* and five of their children are before the Court. It was decided by the Master of the Rolls in *In re Potts' Estate* (1), that

(1) M. R. 1866. Nov. 5.

In re POTTS' ESTATE.

A PETITION was presented under the Leases and Sales of Settled Estates Acts for the purpose of obtaining an order vesting a power to grant building leases in the trustees of the will of *Thomas Potts*, who devised his real estate to trustees, upon trust to pay to or permit his wife to receive the rents and profits thereof during her life, and after her death upon trust to sell the same and to stand possessed of the proceeds upon the trusts therein mentioned. The will contained the usual power to

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the concurrence of the parties beneficially interested in the proceeds of a sale under this Act was not necessary.

Here, however, we have the concurrence of the father and mother and five of the children, and the concurrence of Mrs. *Were*, who is the sixth child, could be obtained if the Court should think it necessary; then the only other persons who have any interest are the children of Mrs. *Were;* but they can have no interest until the death of Mrs. *Were*, consequently it is impossible to ascertain, till her death, who will be entitled. In this respect the case comes within the decision in *Beioley* v. *Carter* (1), where it was held that the concurrence of the unascertained contingent remainderman was not necessary in a sale under this Act. So also in *Eyre* v. *Saunders* (2), it was held that it was not necessary to have the consent of all the *cestuis que trust*, but the consent of the trustees, who had power to receive and give discharges for money, was sufficient. The 18th section of the Act gives power to the Court to reserve the rights "of persons whose consent or concurrence has been refused or cannot be obtained." That can only refer to persons who are capable of consenting, on their refusing to concur, not to unascertained persons. The construction contended for by the purchaser would exclude the operation of the Act in any case where there is a contingent remainder in an unascertained person.

Mr. *Badnall*, for the purchaser:—

I submit that there can be no sale under the Act without the

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the trustees to give receipts. The tenant for life was still living.

Mr. *Kekewich*, for the Petition, said the only question was, whether the concurrence of the persons interested in the proceeds of the sale was necessary under the Act, 19 & 20 Vict. c. 120, s. 17. Where the trust for sale was immediate it had been held that their concurrence was not necessary, but it had been suggested that it might be different, here as the tenant for life was still alive, and the trust for sale and power to give receipts did not come into operation till her death. He cited *Grey* v. *Jenkins* (26 Beav. 351) and *Eyre* v. *Saunders* (4 Jur. (N.S.) 830).

THE MASTER OF THE ROLLS was of opinion that the concurrence of the parties beneficially interested in the proceeds of the sale was not necessary, and made an order vesting a power to grant leases in the trustees of the will.

(1) Law Rep. 4 Ch. 230.
(2) 4 Jur. (N.S.) 830.

concurrence of all the parties interested in the property. The children of Mrs. *Were* will have an interest; and they, as well as Mrs. *Were* herself, must be represented. It was held in *Goodess* v. *Williams* (1), that where a person is seised in fee, defeasible by a conditional limitation, shifting use, or executory devise, that the inheritance is not represented in this Court merely by the person who has the defeasible estate; and *Grey* v. *Jenkins* (2) decided that the expression "persons entitled" in the *Settled Estates Act* meant persons beneficially entitled, and all persons beneficially entitled must concur; and further, that the trustees could only consent for unborn children. Then in *In re Merry's Estate* (before your Honour on the 12th of January, 1867), it was held by your Honour that the Court could not sanction the granting of a lease under the *Settled Estates Act*, however beneficial it might be, if any party interested in the estate opposed it.

The ground of the judgment in *Beioley* v. *Carter* (3) was that no persons could say they were interested in the estate, as no one could be Mrs. *Heighton's* heir until she had executed her power of appointment. Here, on the contrary, the children are alive who will take if they survive their mother. It was never intended by the Act that the tenant for life should have the power of disposing of the property without the consent of the remaindermen, and if the remaindermen are not ascertained the powers of the Act cannot be exercised at all. The 18th section excludes the jurisdiction of the Court in cases where there is a person entitled to an estate of inheritance whose consent cannot be obtained. The decision in *In re Potts' Estate* is opposed to the other authorities, therefore it is fair to say that that is not good law and ought not to be followed.

SIR R. MALINS, V.C.:—

This is a question raised by a summons, whether the order to sell an estate under the *Settled Estates Act* has been made with the necessary concurrence. The order for sale was made upon a Petition in which there were concurring parties, the devisees upon trust, the tenants for life, and five out of the six children

(1) 2 Y. & C. Ch. 595. (2) 26 Beav. 351.
(3) Law Rep. 4 Ch. 230.

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of the tenants for life. The sixth, who did not concur on that occasion, and was not served, will now, I understand, join in the conveyance to the purchaser so as to remove all difficulty on the ground of want of concurrence in that respect.

[The Vice-Chancellor then stated the effect of the settlement, and continued:—]

The objection is that one of the daughters, Mrs. *Were*, has children, and that her children are not made parties. Now it is perfectly clear that no child of Mrs. *Were* could have any interest in this property unless that child should survive Mrs. *Were* herself, and also the grandfather and the grandmother, who are the tenants for life. That is a class of persons that cannot be ascertained, and therefore, in my opinion, it falls within the case of *Beioley* v. *Carter* (1), decided by the Lords Justices overruling the Master of the Rolls. There the property was settled upon a woman and her husband for life, with remainder on such trusts as she should appoint, and in default of appointment upon trust for the person or persons who would take as her heir-at-law. There the person who would be heir-at-law could not be ascertained, and as that could not be ascertained the Master of the Rolls held that there was not the necessary concurrence under the 1st section of the *Settled Estates Act*, and therefore the order for sale was invalid; but upon appeal before the Lords Justices *Selwyn* and *Giffard* it was held, that whilst the concurrence of persons who could be ascertained to have an interest in the property was required, yet, as they could not tell who the heir-at-law would be till the lady died, the concurrence of that party could not be required; and to hold that the property could not be sold without that concurrence would be to hold that it was really inalienable. So here it cannot be ascertained who is the party who would be entitled on the death of the tenant for life, and therefore the consequence of so holding would be, that the property would be inalienable. Mr. *Badnall* says they ought to have the concurrence because they are the persons who might become entitled. To that argument there are two objections; first, it has been decided in *In re Potts' Estate* that where property has been devised to trustees upon trust to sell, with a power of giving receipts, it is not

(1) Law Rep. 4 Ch. 230.

necessary to have the concurrence of any *cestuis que trust* whatever. Here the property is devised upon trust to Mr. and Mrs. *Fox* for life, and after their decease upon trust to sell, to convert it into money, and the grandchildren are to take it, not as an estate, but as money. The Master of the Rolls himself, in *In re Potts' Estate*, held that where the property is devised on trust to sell, it is not necessary to have the concurrence or consent of the *cestuis que trust*. Therefore I should feel justified in coming to the conclusion, and do come to the conclusion, in this case, that if I had not the concurrence of any child of Mrs. *Fox*, or any grandchild whatever, but merely the concurrence of Mr. and Mrs. *Fox* and the trustees, I should have the consent of the persons necessary to the sale. Upon that ground alone I should feel justified in coming to the conclusion that it is not necessary to have any *cestuis que trust* joined. But it happens in this case that there being six children, five out of the six concur, and I think their concurrence is quite sufficient. The costs will come out of the proceeds of the sale.

Solicitor for the Vendors: Mr. *W. H. Bishop*, agent for Mr. *J. G. Jackson, Belper.*

Solicitor for the Purchaser: Mr. *H. Tyrrell*, agent for Messrs. *Challinor & Co., Leek.*

V.-C. W. 1873 July 23, 24.

BISCOE *v.* GREAT EASTERN RAILWAY COMPANY.

[1871 B. 351.]

Railway Company — Statutory Powers — Injunction — Compensation — Jurisdiction — Lands Clauses Consolidation Act, 1845, *s.* 68—*Railways Clauses Consolidation Act*, 1845, *s.* 6—*Chancery Amendment Act*, 1858, *s.* 6.

Where a railway company, in executing works authorized by their statutory powers, took insufficient precautions to secure the safety of an adjoining house, the Court granted an injunction to restrain the negligent exercise of their powers, and appointed a surveyor to report what was necessary to secure the Plaintiffs' premises; and the company having complied with the requisitions of the surveyor, the Court granted an inquiry as to damages.

A railway company is bound to exercise the power given to it in derogation of individual rights with moderation and discretion, and not negligently.

JOSEPH JACKSON, furniture and carpet dealer, by a lease dated the 18th of October, 1856, became lessee of Nos. 25, 26, 27, 28, and 29, *High Street, Shoreditch*, for twenty-one years, subject to covenants well and sufficiently to repair, uphold, sustain, amend, and keep each and every of the said messuages, together with all erections, walls, and party walls, then standing or thereafter to be erected. Mr. *Jackson* carried on in these premises his business for several years. By his will, dated the 7th of March, 1871, he appointed the Plaintiffs his executors, and he gave and bequeathed to them the said business premises and the goodwill of the said business, and other his personal estate, upon trust to carry on the said business in the manner directed in his will. The testator died on the 8th of July, 1871.

The houses in question formed part of a line of houses fronting the *High Street*, and were built one against the other, and mutually dependent upon and supported by each other. They were very old, and No. 24, which adjoined them on the south, was believed to be as old; and the front timbers supporting the front walls and joists were so constructed that any movement of No. 24 must act on No. 25 and the other houses of the Plaintiffs. For fifty years and upwards the Plaintiffs' houses enjoyed as of right the support of No. 25.

The *Great Eastern Railway*, in prosecution of the works authorized by them, acquired the house No. 24 and several houses adjoining on the south side. They pulled down such adjoining houses and proceeded to excavate the ground on the south of No. 24, and proposed to do so to a depth to admit of the railway passing under *High Street*. The effect of those works was to make the house No. 24 lean over to the south to such an extent that the contractors had to shore it up. Under those circumstances the Plaintiffs, the executors of Mr. *Jackson*, directed their solicitor to apply to the solicitor of the company. The letter was acknowledged; but though the letter was acknowledged the company proceeded with the works, and No. 25 began to separate from No. 26. The Plaintiffs' surveyor, a Mr. *Cotes*, then wrote, pointing out the damage that was occasioned to the Plaintiffs' premises; but the company continued to demolish 24, and the only precaution taken to secure No. 25 was putting up a plank preparatory to shoring it up. The Plaintiffs thereupon, on the 4th of December, 1871, filed a bill against the company, and on the same day obtained an interim order for an injunction restraining the Defendants from pulling down No. 24, *High Street*, and from digging or excavating any soil on the south side of No. 24, so as in any way to damage the Plaintiffs' premises until they should have sufficiently secured the same from injury. The order was continued from time to time till the 20th of January, 1872, when the Plaintiffs moved for an injunction and a sequestration against the company, on the ground that they had infringed the injunction by excavating soil south of No. 24, and pulling down part of No. 24. Between the time when the injunction was granted and the motion for a sequestration the district surveyor had required the Plaintiffs to secure Nos. 25 and 26, and the Defendants to pull down No. 24. The Vice-Chancellor was of opinion that the Plaintiffs' evidence failed to shew that the injunction had been infringed, but directed the motion for a sequestration to stand over till the hearing, and that for an injunction to stand over for a few days in order that the parties might agree on a surveyor to report what works were necessary. On the 23rd of January, 1872, Mr. *Hesketh*, surveyor, was appointed by the Court to examine the then condition of the premises, and to report upon

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what had been done in excavating and pulling down, and also what measures ought to be adopted by way of securing the Plaintiffs' premises. The Defendants undertook to do such immediate pressing works as Mr. *Hesketh* should direct. In November, 1872, Mr. *Hesketh* made his report, directing what works should be done by the company. The works directed by Mr. *Hesketh* were done by the company; but the evidence of the Plaintiffs shewed that they had been put to very great expense by the Defendants' works, in addition to what Mr. *Hesketh's* order had remedied.

The case now came on on motion for decree. The Plaintiffs also asked for an inquiry as to the amount of the damage sustained by the Plaintiffs; and one question raised was, up to what time the Court could award damages.

Mr. *Greene*, Q.C., and Mr. *Edwin Ward*, for the Plaintiffs, contended, first, that the evidence shewed that the company had carried on their works in a vexatious, careless, and negligent way, so as to entitle the Plaintiffs to come to this Court for an injunction. Had they exercised proper care, the Plaintiffs' remedy might perhaps have been under the 68th section of the *Lands Clauses Consolidation Act*. It was proved that the Plaintiffs had suffered considerable damage from the carelessness of the Defendants, and were entitled to be indemnified. All the cases shewed that where private individuals suffered from this negligent exercise of powers given to railway companies—which in fact amounted to an excessive exercise of powers—this Court would relieve by injunction and award compensation: *Ricket* v. *Metropolitan Railway Company* (1); *Broadbent* v. *Imperial Gas Company* (2); *Ware* v. *Regents Canal Company* (3); *Clothier* v. *Webster* (4); *Brine* v. *Great Western Railway Company* (5); *Tipping* v. *St. Helen's Smelting Company* (6).

The only question was, up to what time the inquiry should be directed. The Plaintiffs would be satisfied with damages up to Mr. *Hesketh's* report; but they were entitled to them to the hearing. In *Hindley* v. *Emery* Vice-Chancellor *Wood* said (7): "It may be

(1) Law Rep. 2 H. L. 175.
(2) 7 D. M. & G. 436.
(3) 3 De G. & J. 212.
(4) 10 W. R. 624.
(5) Ibid. 341.
(6) Law Rep. 1 Ch. 66.
(7) Law Rep. 1 Eq. 52, 54.

conceded that, if all the mischief had already been completed before the filing of the bill, this Court would not have had jurisdiction to entertain the suit for injunction, and, if that were so, could not grant damages for the mischief done." The Vice-Chancellor went on to say that, the mischief still existing at the filing of the bill, "the Court has jurisdiction to assess damages for the breach of covenant already committed. The intention of the Act 21 & 22 Vict. c. 27 was to give the Court power to grant complete relief whenever it had a well-founded jurisdiction to entertain the case, and not to compel a Plaintiff to seek partial relief in one Court, and then turn him over to another in order to obtain supplemental relief." In that case there had been an order to restore the buildings which had been pulled down; and then an inquiry was directed whether it would be more for the Plaintiffs' benefit that damages should be awarded in lieu of such restoration; which was clearly for damages subsequent to the filing of the bill. At law a Plaintiff was only entitled to damages for injury up to the date of the action; but then he had a right to bring a fresh action *toties quoties*. But Courts of Equity, under the Act 21 & 22 Vict. c. 27, s. 6, were empowered to grant substantial damages for the whole injury: *Stokes* v. *City Offices Company* (1). It was evident, therefore, that the jurisdiction must extend till the time of the hearing.

Vice-Chancellor *Wood* had acted on the same principle in *Middleton* v. *Magnay* (2).

The VICE-CHANCELLOR:—The general principle as to things lawful under an Act of Parliament, and things unlawful also, giving a right to compensation, was much discussed in the Privy Council in *Jones* v. *Stanstead, Shefford, and Chambly Railroad Company* (3).

Mr. *Eddis*, Q.C., and Mr. *Smart*, for the company:—

There was no ground for the interference of the Court, as the works, which it is admitted were lawful, were executed with due precaution and care, and the Plaintiffs' remedy, if any, was under the 68th section of the *Lands Clauses Consolidation Act*.

(1) 13 L. T. (N.S.) 81. (2) 2 H. & M. 233.
(3) Law Rep. 4 P. C. 93.

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The motion to sequestrate was, at all events, a mistake, and must be refused with costs.

If, however, the injunction were properly granted, it would be in vain to deny the jurisdiction of the Court to direct compensation to be assessed up to the date of the hearing. *Davenport* v. *Rylands* (1) seems to be a sufficient authority on that point.

SIR JOHN WICKENS, V.C.:—

This is a case which involves principles of some importance on which there is less authority than might have been supposed.

A railway company, in constructing its works on its own land, may lawfully do acts which no private proprietor could have done. No doubt the railway company is bound in many cases to make compensation to the adjoining owners. But whereas the right to compensation can only arise where an individual in the place of the company would have been liable to damages, there are many cases in which the converse does not hold good; that is to say, in which, although there would be a right to damages against an individual, there is no right to compensation against a railway company. I mean, of course, compensation under the 68th section of the *Lands Clauses Consolidation Act.* Of course the act of the railway company being lawful, subject to the payment of compensation which is not payable until the act is completed, they cannot be restrained by injunction. But a railway company having these wide powers in derogation of individual rights is bound to exercise them with moderation and discretion. The expression in the cases is "negligence," which is hardly the appropriate word, but it is sufficient to convey the idea. For instance, a railway company buying a house in a row, and making a railway cutting fifty feet deep, and just as wide as the house which is bought, with such want of precaution as to throw down adjoining houses on each side, is not exercising its powers as they ought to be exercised, or, in other words, is exceeding them. I think the expression of Lord *Westbury*, in the case of *Ricket* v. *Metropolitan Railway Company* (2), which was cited, is, that it was the exercise of the powers in a vexatious and careless way. The powers are to be exercised with a reasonable regard to the rights of other persons.

(1) Law Rep. 1 Eq. 302. (2) Law Rep. 2 H. L. 175.

In particular cases it might be difficult to define what is and what is not reasonable. But that is the proposition, as a general proposition. It is to the interest of the public that no private rights should stand in the way of the execution of the works; but when the company can construct its works without injury to private rights, it is in general bound to do so. Now, in this case I am convinced that the *Great Eastern Railway Company*, meaning quite fairly, and not desiring to carry things with a high hand—there has been no trace of that throughout the case—proceeded with their operations on their own land without taking all the reasonable precautions required for preserving the adjoining houses. Their works could have been done, it seems, without injuring the houses at all. They had injured them materially when the bill was filed; because, although they had taken some precautions to prevent injury, their precautions were not practically sufficient. It is no answer to this to say, that to prevent all injury, operations on the Plaintiffs' land might have been necessary. If there is nothing, as I take it there is nothing here, to lead to the belief that leave for such operation would have been refused—or that there would have been any difficulty in coming to an agreement between the company and the Plaintiffs, the owners of the adjoining houses, as to operations on both sides which would prevent injury—as I understand the facts and the law, the bill was rightly filed and the injunction rightly applied for. But the motion to sequestrate was a mistake. The truth is, that the injunction was not aptly framed to secure to the Plaintiffs all the protection they needed, and the real mischief struck at by the motion to sequestrate was not caused by any breach of the injunction. The difficulty in which the Plaintiffs were placed was considerable, but it arose from their own fault in the first instance, when they obtained the injunction. The other motion was a mistake; and, had the company offered to submit (as in effect they did) to Mr. *Hesketh's* directions, and had they insisted that, if that offer were accepted, the motion was improper, I ought to have dismissed it with costs. I think I ought, it being now clearly before me, to dismiss it with costs. It follows from this mode of dealing with the case that the costs of Mr. *Hesketh's* operations, and of his report, are costs in the cause, and not costs on the motion to sequestrate.

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Different considerations might have applied if the company had stood on their extreme rights, and had contended that the injunction and the motion to sequestrate were misconceived; and that they were at liberty to proceed with any operations not exactly hit by the words of the injunction as it stood. In that case I think I should have dismissed the motion without costs. But it seems to me fairer in every way to treat it as if I had asked them whether they would give that undertaking to abide by Mr. *Hesketh's* directions; and, as if on their answering in the affirmative, I had then dealt with the motion; in which case I should have dismissed it with costs.

If the company might have done everything required for their works without injuring, even for a time, the Plaintiffs' adjoining houses, abstract justice would seem to require that the company, having secured the Plaintiffs at last, as they might have done at first, should compensate the Plaintiffs in damages for what they suffered from the Defendants' operations being carried on with what is called in the cases "negligence." On looking at the authorities, they are more in favour of that view than against it, although they are less definite than I had hoped to find them. But I think I can see my way to direct an inquiry as to damages, which in effect will be this: "An inquiry what sum ought to be paid by the company to the Plaintiffs in respect of injury to the Plaintiffs by the company having commenced its operations on No. 24 without taking, in the first instance, all necessary precautions to prevent injury to the Plaintiffs' house adjoining on the north." I regret that the company's offer to refer the whole matter to Mr. *Hesketh* was not accepted, as I foresee, if the thing is fought out in Chambers, there may arise a most difficult point of law. There will be the inquiry, and the company must pay the general costs of the suit up to the hearing, including Mr. *Hesketh's* costs and charges, and the Plaintiffs must pay the costs of the motion to sequestrate.

Solicitor for the Plaintiffs: Mr. *Thomas Angell.*
Solicitor for the Company: Mr. *W. H. Shaw.*

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ADVANCEMENT—*continued.*
the marriage who should attain twenty-one as the testator should appoint, and in default of appointment for his next of kin. The sum of £1000 was paid to the husband, who died leaving his wife surviving him. No child of the marriage lived to take a vested interest under the settlement:—*Held*, that the gift of residue in favour of the daughter was adeemed to the extent of the £4000 covenanted to be paid by the testator; but that there was no ademption as to the £1000 given to the husband absolutely. Cooper *v.* Macdonald [258

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AGREEMENT TO TAKE SHARES—*Company—Winding-up—Contributory—Payment necessary to vesting of Shares—Transfer—Discharge of Contract.*] *M.* agreed to take shares in a company incorporated by an Act of Parliament, providing that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share had been paid in respect thereof. *M.* transferred his shares without paying one-fifth of the amount thereof; the transfer was duly registered, and *M.'s* name removed from the register of shareholders. More than a year afterwards the company commenced to be wound up:—*Held*, that *M.'s* original agreement to take shares was discharged by the transfer, which operated as a new contract between the company, *M.*, and the transferee. *In re* Towns' Drainage and Sewage Utilization Company. Morton's Case - 104

AMALGAMATION OF COMPANIES—*Company—Voluntary Winding-up for Purpose of Invalid Amalgamation—Sanction of Liquidators to transfer—Qualified Sanction—Compulsory Winding-up—Effect upon previous Voluntary Liquidation—Companies Act*, 1862, *ss.* 22, 35, 38, 51, 84, 95, 129, 130, 131, 133, 138, 146.] Plaintiffs contracted to purchase shares in a company, and shortly afterwards the directors (with the Plaintiff's knowledge) agreed to amalgamate with another company. Resolutions (the validity of which was disputed on the ground of insufficient notice) were passed and confirmed at two successive meetings, for amalgamation, and that "for enabling the said agreement and the amalgamation thereby agreed on to be carried into effect," the company should be wound up voluntarily. Immediately before the confirmation meeting one of the Plaintiffs agreed to sell his shares; and the other Plaintiff having purchased as agent merely, transfers from the two Plaintiffs, one to his principal, the other to his purchaser, were executed; but, upon the transfers being presented for registration, the liquidators refused to register, except on the terms of the Plaintiffs executing deeds-poll, whereby they should agree to guarantee to the liquidators payment by their transferees of all calls. Plaintiffs accordingly executed the deeds. Afterwards the company were ordered to be wound up compulsorily; and by a decree of the Court the agreement for amalgamation and consequent resolutions were held to be *ultrà vires* and not binding on any dissentient member of the company.—Actions having been commenced by the official liquidators against the Plaintiffs upon the guarantee deeds, bills were filed alleging that the liquidation was invalid, and that the deeds were obtained without consideration, and by misrepresentation and concealment, and were null and void, and ought to be cancelled:—*Held*, that the liquidation-resolution was valid, and that the charges of want of consideration, misrepresentation, and concealment failed; and bills dismissed with costs.—Observations on the powers of voluntary liquidators, and on the effect of proceedings under a voluntary winding-up, when followed by a compulsory order. Cleve *v.* Financial Corporation. Williams *v.* Same - 363

2. —— *Winding-up—Conduct of Shareholders—Repayment of Moneys to Allottees—Interest—Costs—Estoppel—Acquiescence—Dealings with Shares.*] By an agreement dated in August, 1864, the banks of *H.* and *I.* were amalgamated. In September, 1864, a circular was issued by Bank *H.* to each shareholder in Bank *I.*, stating, in effect, that he was entitled to an allotment of a like number of new shares in Bank *H.* on the terms set forth. Bank *I.* was wound up voluntarily. The arrangement between the two banks was made subject to a provision that if any shareholder of Bank *I.* should express his dissent in

AMALGAMATION OF COMPANIES—*continued.*

writing within a period mentioned, he could be paid off.—*W. C.*, who was an allottee of five shares in Bank *I.*, obtained, on his application in writing, an allotment of five shares in exchange of Bank *H.*, and he paid the deposit and premium and directors' calls. Bank *H.* was wound up, at first voluntarily, but afterwards under supervision, and *W. C.* was placed on the list of contributories. In May, 1868, on a bill filed in May, 1866, the amalgamation was set aside. In January, 1871, *W. C.* paid, but under protest, moneys demanded under a balance order. On summons by *W. C.*, in February, 1871, taken out after the decision in *Bank of Hindustan, China, and Japan* v. *Alison* (Law Rep. 6 C. P. 222) :—*Held*, that he was entitled to be repaid, with interest, all the moneys which he had paid upon his five shares, with costs.—*H.*, who was an allottee of five shares in Bank *I.*, obtained, on his application in writing, an allotment of five shares in exchange of Bank *H.*, and he paid the deposit and premium and calls demanded of him by the directors and by the liquidators without any protest. He purchased, at a discount, other shares of Bank *H.* in the market, and had paid moneys on them. On a summons by him in July, 1872 :—*Held*, that he was entitled to be repaid, with interest, all the moneys which he had paid on the whole of his shares, but without costs, by reason of his summons having asked too much.—*A. F. C.* was an allottee of twenty shares in Bank *I.*, and had paid moneys on them to the directors, and he was the purchaser of thirty other shares in the market. He obtained, on his application in writing, an allotment of fifty shares in exchange of Bank *H.*, and he paid the deposit and premium and calls demanded of him by the directors. He attended meetings of the company. In 1866 he sold and transferred his fifty shares, and subsequently repurchased them, and had them re-transferred to him. A summons by him in July, 1872, asking to have his name removed from the list of contributories and to be repaid certain moneys, was dismissed with costs. *In re* BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* CAMPBELL. *Ex parte* HIPPISLEY. *Ex parte* CROOM - 417

3. —— *Resuscitation of Company—Transfer of Shares—Sanction of Directors—Winding-up—Contributory.*] The deed of settlement of a company provided that when a shareholder wished to transfer his shares he should leave a notice at the office of the company, and that the directors should consider the proposal and signify their acceptance or rejection of the proposed transferee; and that, if they should reject the proposed transferee, and should not within fourteen days procure some other person to take the shares at the market price, the proposed transferee should be considered as approved by the directors, and should be entitled to take the transfer accordingly. —The company agreed with the *M. Corporation* for a transfer to it of the company's business, and that the shareholders should be entitled to exchange their shares for shares in the corporation, but there was no formal winding-up of the company. This agreement was acquiesced in by all the shareholders. About a year afterwards the former directors, in the name of the company,

AMALGAMATION OF COMPANIES—*continued.*

entered into an agreement with the corporation that the former agreement should cease, and that the company should resume the principal part of its business. Notice of this resumption of business was given to the shareholders. Shortly afterwards the corporation was wound up. Subsequently, pending an arrangement purporting to relieve from liability certain dissatisfied shareholders, *A.*, the registered holder of 200 shares in the company, transferred them to *P.* for a nominal consideration after giving notice to the directors, and at a meeting of the directors at which *A.* (who was alleged to have been elected a director though not as the deed required) was present, the said transfer was sanctioned. The company was afterwards wound up :—*Held*, that, under the circumstances, the transfer was invalid, and that *A.* must be made a contributory. *Chappell's Case* (Law Rep. 6 Ch. 902) followed. *In re* ACCIDENTAL DEATH INSURANCE COMPANY. ALLIN'S CASE - - - - - - 449

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—— *Cary* v. *Hills* (Law Rep. 15 Eq. 79) disapproved of - - - - 534
See Executor de son Tort.

—— *Chappell's Case* (Law Rep. 6 Ch. 902) followed - - - - 449
See Amalgamation of Companies. 3.

—— *Clogstoun* v. *Walcott* (13 Sim. 523) not followed - - - - 442
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—— *Dickson, In re* (8 D. M. & G. 655) considered - - - - 326
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—— *Flower, In re* (18 L. T. (N.S.) 457; 16 W. R. 457) considered - - - 326
See Taxation of Costs. 2.

—— *Hanson* v. *Graham* (6 Ves. 239) distinguished - - - - 501
See Gift on attaining Twenty-one.

—— *Haswell* v. *Haswell* (2 D. F. & J. 456) considered - - - - 585
See Forfeiture Clause.

—— *Hetham's Trusts, In re* (Law Rep. 12 Eq. 76) not followed - - - 493
See Investment by Trustees.

—— *Leigh* v. *Leigh* (17 Beav. 605) not followed [501
See Gift on attaining Twenty-one.

—— *Liley* v. *Hey* (1 Hare, 580) commented on [581
See Gift to Descendants as they may need

—— *Lumley* v. *Wagner* (1 D. M. & G. 604) considered - - - 189, 433
See Theatrical Engagement.
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—— *Mackay, Ex parte* (Law Rep. 8 Ch. 643) followed - - - - 414
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—— *Miles* v. *Harrison* (V.-C. *Wickens*, 7 June, 1873) observed upon - - 487
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—— *Morgan* v. *Malleson* (Law Rep. 10 Eq. 475) considered - - - - 340
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—— *Murray, Ex parte* (Law Rep. 16 Eq. 215) explained - - - - 623
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—— *Nicholson, In re* (3 D. F. & J. 93) considered
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—— *Notley* v. *Palmer* (Law Rep. 1 Eq. 241) distinguished - - - - 479
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—— *Ogle* v. *Earl Vane* (Law Rep. 2 Q. B. 275) distinguished - - - 155
See Measure of Damages.

—— *Pryce* v. *Bury* (Law Rep. 16 Eq. 153, n.) followed - - - 153, 153, n.
See Deposit of Deeds. 1, 2.

—— *Rayner* v. *Koehler* (Law Rep. 14 Eq. 262) followed - - - - 534
See Executor de son Tort.

—— *Richardson* v. *Richardson* (Law Rep. 3 Eq. 686) considered - - - 340
See Voluntary Gift.

—— *South-Eastern Railway Company, In re* (30 Beav. 215) distinguished - - 479
See Payment out of Court.

—— *Sturge* v. *Dunstable* (6 Beav. 462) observed upon - - - - - 487
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—— *Wickham* v. *Wing* (2 H. & M. 436) considered
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CAVEAT—Probate Court—Appointment of receiver - - - - 34
See Receiver.

CERTIFICATE—Architect—Action on building contract - - - - 554
See Restraining Groundless Action.

CHARITY—*Cy-près*—"Poor prisoners" 129,
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—— Gift to descendants as they may need 581
See Gift to Descendants as they may need.

—— Mortmain—Direction to marshall - 487
See Marshalling.

CHIEF CLERK OF QUEEN'S BENCH—*Bona Vacantia—Abolition of Office—Interest of Suitors' Deposits*—1 *Vict. c.* 30.] The late Lord *Ellenborough* held the office of Chief Clerk of the Court of Queen's Bench from 1811 till 1838, when the office was abolished by the statute 1 Vict. c. 30. During that time he received the suitors' funds paid into Court and invested them in exchequer bills, and received the interest for his own benefit, but from the date of a report of a select committee of the House of Commons in 1834, Lord *Ellenborough*, in deference to the report, left the accumulations of interest standing to a separate account at his bankers. He died in 1871:—*Held*, in a suit to administer his estate, that the executors were not entitled to the accumulated fund, and that it belonged to the Crown. Colchester *v.* Law - - - - - - - 253

CHILD—Illegitimate - - - - 239
See Illegitimate Child.

CLASS—Children then living - - 258
See "Then Living."

—— Shares payable at death of *A.*, vested at twenty-one - - - - 208
See Death before Share payable.

CLOSING OF OFFICES—Delay in filing bill 125
See Injunction before Bill filed. 1.

CO-DEFENDANTS—Correspondence between 112
See Production of Documents. 1.

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See Revocation of Will.

COMBINATION OF OLD DESIGNS - 117
See Copyright of Design.

COMMITTAL UNDER DEBTORS ACT, 1869—*Practice—Attachment—Solicitor—Waiver.*] An order made against *A.*, a solicitor, under the *Debtors Act*, for payment of money by a certain day, with notice that in default his property would be liable to sequestration and himself to be arrested and committed to prison, was followed by the issue of a *fi. fa.*, under which the sheriffs took possession. An arrangement was then made by which the sheriffs withdrew from possession, upon an engagement by *A.* to pay the amount, costs, charges, and interest, by monthly instalments, and in default that they should re-enter under the original order and proceed with the execution of the warrant as if they had not withdrawn from possession.—Default having been made in payment of the instalments:—*Held*, that, after the arrangement for withdrawing from possession and payment by instalments, *A.* could not be attached for default. Harvey *v.* Hall 324

COMPANY—Amalgamation - 363, 417, 449
See Amalgamation of Companies. 1, 2, 3.

—— Borrowing powers - - - 383
See Borrowing Powers.

—— Compulsory powers - - - 636
See Compulsory Powers.

—— Insurance—Transfer of business - 354
See Novation of Contract.

—— Interference of Court with management 294
See Interference with Management of Company.

—— Shares—Agreement to take - - 104
See Agreement to take Shares.

—— Traffic arrangement - - - 433
See Traffic Arrangement.

—— Transfer of shares - - - 559
See Transfer of Shares.

COMPENSATION—Lands Clauses Act—Negligent exercise of parliamentary powers—Jurisdiction of Chancery - - 636
See Compulsory Powers.

—— Lands Clauses Act—*Cul-de-sac* - 108
See Notice to treat.

—— Lands Clauses Act—Tenant from year to year - - - - - 521
See Tenant from Year to Year.

COMPOSITION WITH CREDITORS—Discharge of surety—Reservation of rights against sureties - - - - 60
See Discharge of Surety.

COMPULSORY POWERS—*Railway Company—Injunction—Compensation—Jurisdiction—Lands Clauses Consolidation Act*, 1845, *s.* 68—*Railways Clauses Consolidation Act*, 1845, *s.* 6—*Chancery Amendment Act*, 1858, *s.* 6.] Where a railway company, in executing works authorized by their statutory powers, took insufficient precautions to secure the safety of an adjoining house, the Court granted an injunction to restrain the negligent exercise of their powers, and appointed a surveyor to report what was necessary to secure the Plaintiffs' premises; and the company having complied with the requisitions of the surveyor, the Court granted an inquiry as to damages.—A railway company is bound to exercise the power given to it in derogation of individual rights with moderation and discretion, and not negligently. Biscoe *v.* Great Eastern Railway Company 636

CONDITION—Impossible by act of settlor—Election - - - - - 212
See Election. 1.

—— Precedent—Non-compliance - - 92
See Conditional Gift.

—— Shares not to vest till payment - 104
See Agreement to take Shares.

CONDITIONAL GIFT—*Will—Condition precedent—Non-compliance—Gift over.*] Gift to *F.* of £17,000, provided that, upon attaining twenty-one, or within six months next after, he should, by such legal instruments as counsel should advise, at the cost of the executrix, relinquish and make over to his brother and sister all interest under his parents' settlement; and in case he should neglect to do so within that time, the £17,000 should be reduced to £12,000, and the £5000 should fall into the residue. The legatee was in *India*, serving in the army, at the time specified, and was not informed of the clause, but he subsequently relinquished and made over all interest under his parents' settlement to his brother and sister:—*Held*, that the £5000 belonged to the residuary legatees. *In re* Hodges' Legacy [92

CONFIRMATION—Appointment - - 1
See Excessive Appointment.

CONFIRMATION OF SALES ACT (25 & 26 *Vict. c.* 108)—*Sale and Exchange—Mines and Minerals.*] The Court has power under the *Confirmation of Sales Act* (25 & 26 Vict, c. 108) to give a general direction that persons having powers of sale and exchange in a settlement or will which do not expressly authorize the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorize such reservation or separation. *In re* Wynn's Devised Estates - - - - 237

CONSIDERATION—Illegality - - 275
See Illegal Consideration.

CONTEMPT OF COURT—Distress by landlord after commencement of bankruptcy 97
See Distress after Bankruptcy.

CONTRACT—Negative clause - - 189
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CONTRIBUTORY—Agreement to take shares 104
See Agreement to take Shares.

—— Amalgamation of companies - - 449
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CONVERSION—Real estate—Residuary gift of real estate - - - - 501
See GIFT ON ATTAINING TWENTY-ONE.

COPYHOLDS—Sold as freeholds—Costs of enfranchisement—Settled Estates Act 124
See SETTLED ESTATES ACT. 1.

COPYRIGHT OF DESIGN—*Registration of Designs Act* (5 & 6 *Vict. c.* 100)—*Combination of Old Designs—Proprietor—Purchaser for Value.*] The Plaintiffs registered, under 5 & 6 Vict. c. 100, a design consisting of a double card basket, formed of a combination of two baskets, admitted to be separately old in design. The Plaintiffs were not the designers, but had contracted to purchase the articles in *Germany*, and imported them to *England*:—*Held*, upon motion for an injunction to restrain the sale of an imitation basket, that the articles were not new or original within the meaning of the Act, and that the Plaintiffs, not being the designers, and not having purchased the design for value, were not entitled to the protection of the statute. LAZARUS *v.* CHARLES - - - - - 117

COSTS—Administration suit—Exoneration of residue - - - - - 577
See COSTS IN ADMINISTRATION SUIT.

—— Attorney-General—Charity - - 581
See GIFT TO DESCENDANTS AS THEY MAY NEED.

—— Charge on property recovered - - 490
See SOLICITOR'S LIEN.

—— Composition deed - - - 243
See BANKRUPTCY JURISDICTION.

—— Enfranchisement of copyholds—Settled Estates Act - - - - 124
See SETTLED ESTATES ACT. 1.

—— Lands Clauses Act—Temporary reinvestment - - - - 468
See REINVESTMENT OF PURCHASE-MONEY. 1.

—— Partition suit - - - - 103
See PARTITION SUIT. 2.

—— Shareholders—Void amalgamation of companies - - - - 417
See AMALGAMATION OF COMPANIES. 2.

—— Suit improperly defended—Solicitor 49
See UNDUE INFLUENCE.

—— Taxation - - 285, 326, 469
See TAXATION OF COSTS. 1—3.

COSTS IN ADMINISTRATION SUIT—*Will—Bequest of Legacies and of Residue—Direction that Funeral and Testamentary Expenses be paid by Legatees—Exoneration of Residue—Grant by one Executor of Annuity to co-Executor invalid—Burden of Proof.*] *M. B.* bequeathed £1000 to *E. D. B.* (a natural son of her sister deceased, and one of her executors), and legacies to other persons. By codicil *M. B.*, after stating that her intention was to give to *T. W.*, the other executor, the residue of her estate, after payment of the legacies, free of all deductions in respect of probate duty or on any other account, declared that all the legatees should contribute rateably towards the payment of her funeral and testamentary expenses in exoneration of the residue:—*Held*, that the costs of the suit for the administration of *M. B.'s* estate must be paid out of the residue.—*T. W.*, who had received all the assets, agreed, in consideration of £700, part of the legacy of £1000, to grant an annuity to his co-executor, *E. D. B.*, whose life he knew was a bad one:—*Held*, that the onus was upon *T. W.* to prove that the transaction was a fair one, and that as he had not done so the agreement was invalid. *In re* BIEL'S ESTATE. GRAY *v.* WARNER [577

COUNTY COURT—Bankruptcy jurisdiction—Costs under composition deed - - 243
See BANKRUPTCY JURISDICTION.

—— Jurisdiction—Administration suit - 37
See COUNTY COURT JURISDICTION.

COUNTY COURT JURISDICTION—*Administration Suits—Assignee of Next of Kin.*] The County Courts have power, under the *County Courts Equitable Jurisdiction Act* (28 & 29 Vict. c. 99), to entertain administration suits instituted by the assignees and representatives of next of kin, and of the other classes of persons specified in sect. 1, sub-sect. 1 of that Act. TURNER *v.* RENNOLDSON [37

COVENANT—Indemnity—Dissolution of partnership - - - - - 60
See DISCHARGE OF SURETY.

—— Settlement of after-acquired property 496
See COVENANT TO SETTLE.

COVENANT TO SETTLE—*Marriage Settlement—After-acquired Property—Funds derived from Different Sources—Advancements.*] Where a covenant to settle after-acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source.—Where a party, having entered into such a covenant, becomes entitled in possession to property which would be subject to the settlement if sufficient in amount, and which has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement. HOOD *v.* FRANKLIN - - - - - 496

CREDITOR HOLDING SECURITY—*Garnishee Order—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 62—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*sub-s.* 5), 95.] A creditor of a liquidating debtor who before the presentation of the Petition has obtained a garnishee order affecting money accruing due to his debtor, but who has not obtained any order for payment by the garnishee, is not a secured creditor within the meaning of the *Bankruptcy Act*, 1869. *Ex parte* GREENWAY. *In re* ADAMS 619

CROSS-EXAMINATION—Affidavit verifying accounts - - - - 102
See AFFIDAVIT WITH ACCOUNTS.

CUL-DE-SAC—Dedication to the public - 108
See NOTICE TO TREAT.

CY-PRÈS—*Lapsed Charity*—"*Poor Prisoners*"—*Education of Children—School for Children of Convicts.*] Certain charitable trusts declared a century or two ago in favour of poor prisoners in the city of *London* having lapsed by reason of the

CY-PRÈS—*continued.*
abolition of the law of imprisonment for debt and the closing of debtors' prisons, the Attorney-General by a scheme proposed that all the funds should be treated as one charity, and applied to the building, establishment, and maintenance of a school for children of persons convicted of crime, and undergoing sentence:—*Held*, upon the construction of the bequests, that by "poor prisoners" were meant prisoners for debt, especially the poorest and most sickly of such prisoners, and in all cases adults; and that there was no intention to relieve children, or to assist education:—*Held*, consequently, that the proposal did not approach sufficiently near to the charitable intentions of the donors to admit of the funds being applied *cy-près* in the manner proposed:—*Held*, further, that the proposed scheme would be unnecessary, as contemplating an object already partially or wholly, and better, provided for by the *Industrial Schools Act*; inconsistent with charitable intention, as tending to the relief of the public rates and taxes; and inexpedient, as resulting in the assemblage together in one establishment of children suffering under a common misfortune, and thus perpetuating the memory of that misfortune. *In re* PRISON CHARITIES - - - - - - 129

2. —— "*Poor Prisoners.*"] A charity was established in 1727 for the relief of poor prisoners in *Ludgate* and the *Marshalsea*. In 1867 a scheme was ordered for the extension of the relief to prisoners in any gaol in *England* or *Wales*, or in aiding their families, or aiding prisoners to get work on their discharge. ATTORNEY-GENERAL *v.* HANKEY - - - - - 140, n.

DAMAGES—Award under arbitration - 26
See SPECIALTY DEBT.
—— Measure of - - - - 155
See MEASURE OF DAMAGES.

DEAN FOREST—Grant of gales - - 294
See FREE MINERS.

DEATH BEFORE SHARE PAYABLE—*Will—Construction—Gift of Personalty "payable" at the Death of A. to a Class—Shares to be "vested" on majority or marriage, and Income in the meantime to be paid towards Maintenance—No Gift over—"Vested" held to mean "Vested in Possession."*] Testatrix gave a legacy of £4000, "payable at the decease of *A.* to a class of persons, to be equally divided amongst them, share and share alike, the said shares to be "vested" interests on majority or marriage, and the income, in the event of *A.*'s death in the meantime, to be paid towards the maintenance and education of such persons. There was no gift over. Two of the class survived *A.*, and died under twenty-one:—*Held*, that by the word "vested" was meant "vested in possession," and that the shares of the deceased minors passed to their legal personal representatives. SIMPSON *v.* PEACH - - - - 208

DEBT—Specialty or simple contract—Award in respect of rent - - - 26
See SPECIALTY DEBT.

DECLARATION OF TRUST—Voluntary gift 340
See VOLUNTARY GIFT.

DEEDS—Deposit of - - - 153, 153, n.
See DEPOSIT OF DEEDS. 1, 2.

DELIVERY OF BILL OF COSTS - - 326
See TAXATION OF COSTS. 2.

DEPOSIT OF DEEDS—*Equitable Mortgage by Deposit — Foreclosure.*] The relief to which an equitable mortgagee by deposit is entitled is foreclosure, not sale.—*Pryce* v. *Bury* (Law Rep. 16 Eq. 153, n.) followed. JAMES *v.* JAMES - 153

2. —— *Equitable Mortgage — Foreclosure.*] The law is settled that the right of an equitable mortgagee by deposit of deeds is foreclosure, not sale. Form of decree. PRYCE *v.* BURY 153, n.

DESIGNS—Copyright of—Purchase for value. 117
See COPYRIGHT OF DESIGN.

DIRECTORS—Power to refuse to register transfer
See TRANSFER OF SHARES. [559
—— Sanction of—Transfer of shares - 449
See AMALGAMATION OF COMPANIES. 3.

DISCHARGE IN BANKRUPTCY—*Partner—Separate Liquidation — Release from Joint Debts — Bankruptcy Act*, 1869, (32 & 33 *Vict. c.* 71), *ss.* 49, 50, 102, 103, 104, 105, 125—*Bankruptcy Rules*, 1870, *rr.* 285, 286, 287.] Under the *Bankruptcy Act*, 1869 (as under the former Bankruptcy Acts), an order of discharge granted to a debtor, who is one of a partnership firm, in his separate bankruptcy or liquidation, releases him from his joint as well as from his separate debts. *Ex parte* HAMMOND. *In re* HAMMOND AND NEVARD [614

DISCHARGE OF SURETY—*Principal and Surety—Joint and Several Bonds—Covenant of Indemnity—Discharge of Surety by variation of Contract with Principal.*] In 1869, *A.* retired from a partnership which had been carried on between *A.*, *B.*, and *C.*, *B.* purchasing *A.'s* share in the business and covenanting to indemnify him against all partnership debts and liabilities. The liabilities then existing included two bonds given to secure moneys advanced to the firm for partnership purposes, on which *A.* and *B.* had become jointly and severally liable to *D.*—In August, 1871, *B.* and *C.* made an arrangement with their creditors under the *Bankruptcy Act*, 1869. Resolutions were passed by the creditors, including *D.*, who proved for his debt, to accept a composition of 15*s.* 3*d.* in the pound, payable by instalments extending over two years; and an inspectorship deed releasing *B.* and *C.*, and reserving to the creditors their rights against any surety or person other than *B.* and *C.*, liable in respect of the debts thereby released, was executed by the creditors, including *D.*:—*Held*, that the effect of the composition under which time had been given to *B.* and *C.*, as principal debtors, without the consent of *A.*, was to discharge *A.*—Where resolutions formally agreed to by creditors under sects. 125, 126 of the *Bankruptcy Act*, 1869, contain no reservation of any rights against co-debtors or sureties, the reservation of such rights by a subsequent deed of composition is inoperative. WILSON *v.* LLOYD - - - - - 60

DISCOVERY—Solicitor who prepared deeds 49
See UNDUE INFLUENCE.

DISCRETION—Court — Order for production of documents - - - - 552
See PRODUCTION OF DOCUMENTS. 3.

DISENTAILING DEED—Purchase-money—Lands Clauses Act - - - - 479
See Payment out of Court.

DISSENTERS—Burial ground - - 288
See Burial Ground.

DISSOLUTION OF PARTNERSHIP—*Misconduct—Return of Premium.*] Where a partnership is determined prematurely, if the incoming partner has paid a premium he is in all cases entitled to have a proportionate part of the premium returned. except, first, where there has been actual or implied release or waiver of the right to it; or, secondly, where there has been actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether.—Mere conduct entitling the other partner to a dissolution is not sufficient, inasmuch as this Court does not fine for immorality or even dishonesty in the abstract. Wilson *v.* Johnstone - - - 606

DISTRESS AFTER BANKRUPTCY—*Liquidation—Appointment of Receiver—Landlord—Contempt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71) *s.* 34—*Bankruptcy Rules*, 1870, *rr.* 260, 299.] After a liquidation petition had been filed and a receiver had been appointed, and had taken possession of the debtor's property, the debtor's landlord, without asking the leave of the Court, levied a distress for a year's rent due to him. The Judge of the County Court restrained the landlord from proceeding with his distress, and ordered him to be committed for contempt of Court:—*Held*, that the Court could not interfere with the statutory right given to the landlord by sect. 34 of the *Bankruptcy Act*, 1869; and the order for committal discharged. *Ex parte* Till. *In re* Mayhew 97

DOCUMENTS—Production of - 112, 179, 552
See Production of Documents. 1—3.

DOMICIL—Bequest of leaseholds—*Lex rei sitæ*
See Accumulations. [461

DOUBLE PORTIONS - - - - 258
See Advancement.

DOWER—Election—Annuity to widow - 595
See Election. 2.

ECCLESIASTICAL COMMISSIONERS—Renewable leaseholds - - - - 163
See Renewable Leaseholds.

ELECTION—*Will—Hotchpot Clause—Condition.*] A testator gave all his property equally among his three daughters, *S.*, *M.*, and *J.*, and directed *J.*, within twelve months after attaining twenty-one, to bring into hotchpot an estate (B.) to which she was separately entitled. On her marriage, subsequently to the date of the will, her estate, at the testator's instance, was settled on herself for life, remainder to her husband for life, remainder as she should appoint among her children, and was subsequently, also by the testator's advice, sold, and the proceeds held on the same trusts. In a suit to administer the testator's estate:—*Held*, that *J.* must bring into account the proceeds (less the costs of sale) of estate B. Middleton *v.* Windross - - - - - 212

2. —— *Will—Annuity to Widow—Freebench Leasing Powers.*] Gift by a testator of a legacy of £200 and an annuity of £700 to his widow (for life or until her second marriage), charged upon part of his freehold and copyhold hereditaments, with a direction that she should occupy his mansion house and enjoy the rents of a portion of the property. The testator then devised his real estate specifically, and gave to his trustees powers of managing and leasing. His real estate consisted chiefly of customary lands, out of which his widow was entitled to freebench; but the evidence shewed that in no instance in these manors had a widow ever been admitted or her freebench set out by metes and bounds:—*Held*, that the widow was put to her election. Thompson *v.* Burra - - - - - 592

ENFRANCHISEMENT—Costs of—Settled Estates Act - - - - - 124
See Settled Estates Act. 1.

EQUITABLE ASSIGNMENT—Agreement for bill of sale - - - - 414
See Registration of Bill of Sale.

EVIDENCE—Affidavit verifying accounts 102
See Affidavit with Accounts.

—— Parol trust—Statute of Frauds - 182
See Frauds, Statute of.

—— Privileges of witness—Pending actions against witness - - - 76
See Privilege of Witness.

—— Settlement of married woman - - 127
See Affidavit of no Settlement.

—— To explain will - - - 19, 515
See Mistake in Will. 1, 2.

EXAMINATION OF COMPOUNDING DEBTOR—*Jurisdiction of Court—Fraud—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] After the creditors of a debtor have resolved to accept a composition, and the resolutions have been registered, the Court has jurisdiction, if a dissentient creditor makes out a *primâ facie* case of fraud on the part of the debtor, to order him to be examined as to his affairs.—*Ex parte Levy* (Law Rep. 11 Eq. 619) explained. *Ex parte* Jones. *In re* Jones - 386

EXCESSIVE APPOINTMENT—*Settlement—General and Specific Appointments—Invalid Appointment—Remoteness—Confirmation.*] Where an appointment is made to take effect out of a trust fund generally, and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment; and the specifically appointed portion is only to be resorted to in the event of a deficiency. *G.* having, under his marriage settlement, a power to appoint amongst his children, appointed a portion of the trust fund to his daughter *L.* for life, and after her death as she should by will appoint:—*Held*, that the power of appointment by will conferred on the daughter was void for remoteness. *G.* also appointed another portion of the trust fund upon such trusts to take effect after the marriage of his daughter *E.* (then unmarried) as she should by deed or will appoint, and in the meantime upon trust for her for life, and after her death as she should by will appoint. *E.*, upon her marriage, purported to appoint the fund to the trustees of her marriage settlement. *G.* afterwards executed a deed poll by which, after reciting the appoint-

EXCESSIVE APPOINTMENT—*continued.*
ments in favour of *L.* and *E.*, and also other appointments, he, in exercise of the power given to him by his marriage settlement, confirmed the several appointments appearing by the recitals to have been previously made, and directed and appointed that the trustees of the settlement should hold the trust funds upon the trusts thereinafter mentioned; and he reserved to himself a power to revoke the direction and appointment thereby made, which power of revocation *G.* afterwards exercised. *E.* also afterwards made a second appointment to the trustees of her marriage settlement of the fund:—*Held*, first, that the original appointment in favour of *E.* was void for remoteness, and could not be supported as an appointment to *E.* and a re-settlement by her:—Secondly: That the subsequent deed poll operated as a re-appointment of the fund in favour of *E.*:—Thirdly: That the power of revocation extended only to appointments made by the way of "direction and appointment" and not to appointments made by way of "confirmation;" and, consequently, that the fund appointed in favour of *E.* passed to the trustees of her marriage settlement under the second appointment executed by her. MORGAN *v.* GRONOW 1

EXECUTOR—*De son tort*—Suit to administer estate—Parties - - - 534
See EXECUTOR DE SON TORT.

—— Grant of annuity to legatee - - 577
See COSTS IN ADMINISTRATION SUIT.

—— Liability of—Misappropriation by solicitor
See LIABILITY OF EXECUTOR. [203

—— Right of retainer—Legacy of married woman
See RETAINER BY EXECUTOR. [481

EXECUTOR DE SON TORT—*County Court Appeal—Suit to administer Estate—No Personal Representative.*] Where a person possesses himself of the assets of a testator or of an intestate without having administered, a bill for an account, to the extent of the specific assets he has received, will lie against him as executor *de son tort*, though there is no legal personal representative.—*Rayner* v. *Koehler* (Law Rep. 14 Eq. 262) adhered to.—*Cary* v. *Hills* (Law Rep. 15 Eq. 79) dissented from. COOTE *v.* WHITTINGTON - - 534

EXONERATION OF RESIDUE—Funeral and testamentary expenses—Costs of suit 577
See COSTS IN ADMINISTRATION SUIT.

FALSA DEMONSTRATIO - - 19, 168
See MISTAKE IN WILL. 1, 2.

FIDUCIARY RELATION - - - 49
See UNDUE INFLUENCE.

FORBEARANCE OF BUYER—Non-delivery of goods - - - - 155
See MEASURE OF DAMAGES.

FORECLOSURE—Equitable mortgage by deposit of deeds—Form of decree - 153, 153, n.
See DEPOSIT OF DEEDS. 1, 2.

FORFEITURE CLAUSE—*Will—Construction—Gift for Life or until Bankruptcy or Insolvency—Gift over to Children—Effect of a Declaration of Insolvency in South Australia—Power of Appointment.*] A testator gave his interest in leasehold property in *Wales* to trustees to pay half of the rents to his son *H.* for life, or until his bankruptcy

FORFEITURE CLAUSE—*continued.*
or insolvency, and after his decease or bankruptcy or insolvency to pay the same for the benefit of all or any of his children as he should appoint, and in default of appointment to pay the same for the benefit of all the children equally. *H.* carried on business at *Adelaide, S.A.*, for some years, and while residing there filed, in July, 1863, a declaration in insolvency. He, after obtaining his certificate in December, 1864, returned to *England*. He had five children, one being born after the date of the insolvency. There was a gift for the benefit of another son, *F.*, and his children in similar terms of the remaining half of the rents, and there was a proviso in the will, that if at the death of the testator's wife *F.* or *H.*, or the issue of either who should be dead, should become entitled in possession to other estates, called *De Coetlogan*, he or they should take no part of the rents of the leasehold property, but that the other son, or his issue, should take the whole of such rents. The testator's widow died in 1866, and thereupon *F.* became entitled to the *De Coetlogan* estates:—*Held*, that the gift over took effect on the declaration of insolvency; that the power of appointment was unaffected by the insolvency, and that it was subsisting; and that on the death of the widow new trusts affecting the entirety of the rents arose, which, subject to *H.'s* power of appointment, were for the benefit of his five children.—*Haswell* v. *Haswell* (2 D. F. & J. 456) and *Wickham* v. *Wing* (2 H. & M. 436) considered. *In re* AYLWIN'S TRUSTS - - - - 585

FRAUD—Compounding debtor - - 386
See EXAMINATION OF COMPOUNDING DEBTOR.

—— Evidence of—Parol trust—Statute of Frauds - - - - 182
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—— Fraudulent preference—Bankruptcy - 397
See FRAUDULENT PREFERENCE.

—— Married woman—Restraint on anticipation
See RESTRAINT ON ANTICIPATION. [29

—— Undue influence - - - 49
See UNDUE INFLUENCE.

FRAUDS, STATUTE OF—*County Court Appeal—Fraud—Evidence*—28 & 29 *Vict. c.* 99, *s.* 18.] A plaint in the County Court stated that the Plaintiff had assigned to the Defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises were to be held by the Defendant in trust for the Plaintiff. Evidence was given on both sides, but the Judge, being of opinion that actual fraud had not been proved against the Defendant, and there being no resulting trust in the assignment, decided that the *Statute of Frauds* was applicable, and dismissed the plaint, without coming to any distinct decision upon the evidence:—*Held*, upon appeal, that the Judge ought to have decided that the *Statute of Frauds* had no application; and the Court, upon a consideration of the evidence, decided that the Plaintiff was entitled to relief, and reversed the decree. BOOTH *v.* TURLE - - - - - - 182

—— Yearly tenant with verbal agreement for continuance - - - - 521
See TENANT FROM YEAR TO YEAR.

FRAUDULENT PREFERENCE — *Act of Bankruptcy—Assignment of whole Property for a past Debt—Limit of Three Months before Bankruptcy—Purchaser in Good Faith, and for Valuable Consideration—Issues of Fact found by a Jury—Power of Court to disregard them—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2, *ss.* 72, 92, 94.] On the 6th of June, 1871, *G.*, a dealer in oil, borrowed £400 of *N.*, his brother-in-law, the money to be repaid in a month. The money not having been repaid when due, *N.* pressed for it, and ultimately placed the matter in the hands of his solicitors, who gave *G.* to the end of July to pay. On the 1st of August *G.* asked *N.* for further time, and *N.* said he must have a speedy settlement or he should take proceedings. *G.* said he would do what he could during the week. On the 5th of August he went to *N.*, and said he had no money, but that he had some oil, and that if *N.* could induce a firm of *B. & Co.*, in which he had formerly been a partner, to buy it, he should be paid out of the proceeds. *N.* went to *B.* and explained the circumstances to him, and ultimately *B.* consented to treat with *G.* *G.* then went to *B.*, and, in the result, a contract was entered into by *B.* on behalf of his firm to buy fourteen casks of oil from *G.* At this time *G.* had, in fact, no oil, but on the 9th of August he ordered fourteen casks from *W.* on credit, and this oil was by *G.*'s direction sent to *B. & Co.* *G.* never paid for it, and had no means of doing so when he ordered it. On the 15th of August *G.* called at the warehouse of *B. & Co.* to settle the purchase, and by his order *B. & Co.* paid to *N.* the amount of his loan and interest, and paid the balance of the price of the oil to *G.* On the 6th of April, 1872, *G.* was adjudicated a bankrupt, the act of bankruptcy being the filing of a petition for liquidation on the 7th of March. The trustee afterwards applied to the County Court to set aside the payment of the £400 to *N.* as a fraudulent preference and an act of bankruptcy. The case was tried by a jury, who found that when the transaction took place the oil was substantially the whole of the bankrupt's property; that to the knowledge of *N.* he was insolvent; and that the transfer was not made *bonâ fide*, but fraudulently without pressure, with a view of giving *N.* a preference over the other creditors of *G.*—The Judge thereupon *held* that the transaction was void as an act of bankruptcy, and a fraudulent preference, and ordered *N.* to pay to the trustee the sum which he had received.—On appeal, *held*, that the purchase of the oil was a *bonâ fide* transaction in the ordinary course of trade, and that *N.* was a payee in good faith, and for valuable consideration; that there was no act of bankruptcy and no fraudulent preference.—The order of the County Court Judge was, therefore, discharged.—The proviso in sect. 92 of the *Bankruptcy Act*, 1869, in favour of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration, extends to a case where the consideration is the payment of a pre-existing debt.—The Court may disregard the finding of a jury if it sees that it is inconsistent with the evidence, and need not direct a new trial to take place. *Ex parte* Norton. *In re* Golden - 397

—— Charge given to bankers - - 391
See Bankruptcy Appeal.

FREE MINERS—*Forest of Dean—Mining Regulations—Grant of Gales*—1 & 2 *Vict. c.* 43. *s.* 61.] Where a free miner in the *Forest of Dean* has had three gales or allotments granted to him, and has surrendered one of such gales on the ground that there was not sufficient coal to make the gale worth working, he will be entitled to another gale equally as if the coal in one of the three gales had been exhausted within the language of the 61st section of 1 & 2 Vict. c. 43. Ellway *v.* Davis [294

FREEBENCH—Election—Annuity to widow 595
See Election. 2.

FUND IN COURT—Disbursements by solicitor—Interest - - - - 285
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—— Interim investment—Settled Estates Act
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GALES—Grant of - - - - 294
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GARNISHEE ORDER—Secured creditor—Bankruptcy - - - - 619
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GENERAL RULES IN BANKRUPTCY, 1870—Rule 143 - - - - 391
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—— Rules 266, 267 - - - - 625
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—— Rule 274 - - - - 215, 623
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—— Rules 285, 286, 287 - - - 218
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—— Rules 285, 286, 287 - - - 614
See Discharge in Bankruptcy.

GENERAL RULES IN BANKRUPTCY, 1871—Table A - - - 215, 623
See Stamps. 1, 2.

GIFT ON ATTAINING TWENTY-ONE—*Will—Construction—Conversion of Real Estate—Residuary Gift of Personal Estate—Period of Vesting—Death under Twenty-one.*] A testator gave all his real and personal estate to trustees to convert into money, and out of the proceeds of the conversion to pay various legacies and annuities, and he directed his trustees to hold the residue of his said personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his decease, until they should attain twenty-one, and when they attained that age upon trust to pay or transfer the said residue of his said personal estate unto the four children in equal shares as tenants in common:—*Held*, first, that the residuary clause passed all the real estate which the testator had before directed to be converted, as well as all the personalty:—*Held*, also, that the shares of the four children did not vest till twenty-one, and that the share of one child who died under twenty-one was undisposed of, and passed as to the realty to the heir-at-law, and as to the personalty to the next of kin of the testator. —*Hanson* v. *Graham* (6 Ves. 239) distinguished. *Leigh* v. *Leigh* (17 Beav. 605) not followed. Spencer *v.* Wilson - - - - 501

GIFT TO DESCENDANTS AS THEY MAY NEED — *Charity — Perpetuity — Solicitor and Client — Costs—Attorney-General.*] A testator gave the residue of his real and personal estate to trustees for investment in Government securities in their joint names, and directed the interest from time to time to be given to such of the lineal descendants of *R. W.* as they might severally need; and the trustees were to make provision for ensuring a continuance of the trust at their decease:—*Held*, that the gift was charitable.—*Attorney-General* v. *Price* (17 Ves. 371) followed. *Liley* v. *Hey* (1 Hare, 580) commented upon. Gillam *v.* Taylor 581

GLEBE—Purchase of, under Lands Clauses Act [574
See Reinvestment of Purchase-money. 2.

HOTCHPOT CLAUSE—Election - - 212
See Election. 1.

HOUSE OR OTHER BUILDING—Lands Clauses Act, s. 92 - - - - 458
See Part of House.

HUSBAND AND WIFE—Affidavit of no settlement - - - - - 127
See Affidavit of no Settlement.

—— Separate estate—Restraint on anticipation
See Restraint on Anticipation. [29

—— Wife's reversionary interest—Executor's right of retainer - - - - 481
See Retainer by Executor.

ILLEGAL CONSIDERATION — *Settlement — Marriage with Deceased Wife's Sister—Setting aside Settlement — Particeps Criminis.*] A Court of Equity will not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument.—A widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a deed by which it was recited that he was desirous of making a settlement and provision for the lady, and had transferred certain shares into the names of trustees upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint; and they afterwards lived together as man and wife until the widower's death. Ten years after such death, and some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad and illegal consideration:—*Held*, that the suit could not be maintained. Ayerst *v.* Jenkins 275

ILLEGITIMATE CHILD — *Bequest — "Leaving" construed to mean "having."*] A testator gave a fund to trustees to pay the dividends to his daughter for life, and after her decease to transfer the principal equally amongst all the children of his said daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their executors, administrators, and assigns. But in case

ILLEGITIMATE CHILD—*continued.*
his daughter should die "leaving" no issue, then to the testator's other children.—Long before the date of the will the testator's daughter was, with the testator's knowledge, living with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. The daughter being sixty-seven years of age, and having had no other child, and her husband being dead:—*Held*, that the illegitimate son was entitled absolutely to the capital, and the word "leaving" being construed "having," and he being now over twenty-one, the money was ordered to be paid to the mother and son, who petitioned for payment to them jointly. *In re* Brown's Trust - - - - 239

INCOME—Payment of debts and legacies out of
See Adjustment of Accounts. [320

—— Unapplied—Maintenance of infant—Vesting
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INCOMPLETE GIFT—Invalid declaration of trust
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INJUNCTION—Action to which good defence at law - - - - - 554
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—— Bankruptcy—Distress by landlord - 97
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—— Railway company — Negligent exercise of compulsory powers - - - 636
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—— Theatrical engagement - - 189
See Theatrical Engagement.

—— Traffic arrangement - - - 433
See Traffic Arrangement.

—— Management of public company—Jurisdiction - - - - - 298
See Interference with Management of Company.

INJUNCTION BEFORE BILL FILED—*Practice—Closing of Offices.*] Where, on account of the offices of the Court being closed, the filing of a bill has been delayed, the Court may grant an injunction before bill filed, and direct the bill and affidavit to be filed as on the day when the offices were closed. Carr *v.* Morice - 125

2. —— *Practice—Urgent Case.*] In an urgent case an interim injunction may be granted before bill filed. Thorneloe *v.* Skoines - - 126

INSOLVENCY—Gift over on—Insolvency in *Australia* - - - - - 585
See Forfeiture Clause.

INSTALMENTS—Non-delivery of—Forbearance of buyer - - - - 155
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INSURANCE COMPANY—Transfer of business—Novation of contract - - 354
See Novation of Contract.

INTEREST—Repayment of money to allottees of shares - - - - 417
See Amalgamation of Companies. 2.

INTERFERENCE WITH MANAGEMENT OF COMPANY—*Public Company—Managing Body—Receiver—Jurisdiction.*] The existence of disputes between different members of the governing body of a company which prevent its affairs being carried on properly, is a ground for the intervention of the Court by injunction and receiver to protect the property of the company, but the interference of the Court will be continued only until a governing body is duly appointed. Featherstone *v.* Cooke. Trade Auxiliary Company *v.* Vickers - - - - - - 298

INVESTMENT—Purchase-money under Settled Estates Act - - - - 532
See Settled Estates Act. 3.

—— Purchase-money—Lands Clauses Act—Reinvestment - - - 468, 574
See Reinvestment of Purchase-money. 1, 2.

—— Trustees—Power to invest in land - 493
See Investment by Trustees.

INVESTMENT BY TRUSTEES—*Will—Direction to invest Personalty in Purchase of Lands—Tenant for Life—Power to apply Personalty in Necessary Repairs.*] Where the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person who should become tenant for life, and the accumulated fund and interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses:—*Held*, that no part of such accumulated fund could be applied, at the instance of a tenant for life, in necessary repairs and improvements on the estate. *In re Lord Hotham's Trusts* (Law Rep. 12 Eq. 76) not followed. Brunskill *v.* Caird - - 493

IRISH DOMICIL—Thellusson Act—Leaseholds
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ISSUES AT LAW—Patent suit - - 447
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JOINT AND SEPARATE DEBTS—Separate liquidation—Discharge - - - 614
See Discharge in Bankruptcy.

JOINT AND SEPARATE ESTATE—*Liquidation Petition—Debtor's Statement of Assets and Debts—Distinction between Joint and Separate Assets and Debts—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 103, 104, 125, *sub-s.* 3—*Bankruptcy Rules*, 1870, *rr.* 285, 286, 287.] A debtor filed a liquidation petition describing himself as carrying on business alone. He had formerly been in partnership, but the partnership had come to an end more than a year before the petition was filed. There were debts of the firm remaining unpaid. The debtor's statement did not shew which were his joint and which were his separate assets or debts, and on this ground the Registrar refused to register the resolutions which the creditors passed for liquidation by arrangement, though all the creditors had had notice of the meetings, and no one objected to the registration. The Judge of the County Court affirmed the decision of the Registrar:—*Held*, on appeal, that the Registrar's decision was right. *Ex parte* Cockayne. *In re* Cockayne - - - - - - 218

JURISDICTION — Arbitration clause — Railway Companies Arbitration Act, 1859 433
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—— County Court—Administration suit - 37
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—— Management of public company — Interference of Court - - - 294
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LANDLORD AND TENANT—Distress after commencement of bankruptcy - 97
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LAPSED CHARITY—Relief of poor prisoners
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LEASE — Renewable — Ecclesiastical Commissioners - - - - 163
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LEASEHOLD — Bequest of—Domicil — Accumulations - - - - 461
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—— Compensation under Lands Clauses Act 521
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—— Renewable—Ecclesiastical Commissioners
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LEGACY—Charge on real estate—Blended fund
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—— Specific—Legacy duty - - - 19
See Legacy Duty.

—— Specific or general - - - 308
See Legacy, Specific or General.

LEGACY DUTY—*Specific Legacy—Abatement.*] A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, and in the case of a deficiency of assets must abate along with other pecuniary legacies. Farrer *v.* St. Catharine's College, Cambridge - - - - 19

LEGACY, SPECIFIC OR GENERAL—*Will—Appointment by Married Woman—Specific Legacy—Proportionate Part of a Sum of Stock—Probate Duty—23 Vict. c.* 15.] A married woman who had a power of appointment over a fund invested in Government stock, by her will gave legacies of specified sums of the fund:—*Held*, that the legacies were specific, and carried interest from her death.—The legacies so given did not exhaust the fund, and there was a residuary gift of the fund after payment thereout of the testatrix's debts, funeral and testamentary expenses:—*Held*, that though the disposition of the residue of the fund was also specific, the words of the will threw the payment of the whole of the probate duty upon the residue. Davies *v.* Fowler - - 308

LEGATEE—Apportionment of income - 528
See Apportionment of Dividends.

—— Description of—Ambiguity - - 515
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—— Description of—Mistake - - 19
See Mistake in Will. 1.

LEX REI SITÆ—Bequest of leaseholds - 461
See Accumulations.

LIABILITY OF EXECUTOR—*Loss by Failure of Solicitor.*] One of three executors having em-

LIABILITY OF EXECUTOR—*continued.*
ployed in proving the will the solicitor who was employed by the testatrix in making it, also employed the same solicitor to negotiate for the compromise of a debt due from the estate. The executor and the creditor were both living in *London*. In June, 1872, the solicitor wrote to the executor, informing him that a compromise had been effected of this particular debt for £260, and of another debt for £50, and asking for a cheque. The executor, on the 4th of July, sent a cheque for £310 to the solicitor, who paid it in to his own account.—The compromise, in fact, had not been effected, and the money was misappropriated; but the executor, having taken no step in the meantime, did not find out the loss until December, 1872:—*Held*, that the £310 ought to be allowed to the executor. *In re* Bird. Oriental Commercial Bank *v.* Savin - - - 203

LIABILITY OF TRUSTEES—*Settlement—Trustee and Cestui que Trust—Power—Appointment by Wife—Notice to Original Trustees—Appointment of New Trustees of Settlement—Dealing with Trust Funds—Non-liability of New Trustees—Priority—Duty of New Trustees—Practice of the Court.*] Funds belonging to *L. M.* were, on her marriage in 1834, vested in three trustees (one of whom died in 1840) in trust for her for life for her separate use, without power of anticipation, and after her death for the children of the marriage, and in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband and wife executed a deed to secure the payment of moneys due from him, and the wife appointed that in case there should be no child of the marriage, and if she should die in the husband's lifetime, the trustees of the settlement of 1834 should, out of the trust funds, raise sufficient to pay the husband's debt. —Notice was given of the deed of 1843 to the two surviving trustees of the settlement.—In 1848 the wife and the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, and assigned to them the trust funds. One of those trustees died, and the two surviving trustees and the survivor of them, at the request of the husband and wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in March, 1870, without having had any child. The husband survived. The survivor of the trustees of 1848 in May, 1870, received a notice from *R. L.* of a charge on the leaseholds in his favour, dated the 5th of October, 1864; and in October, 1870, he received a notice of the deed of 1843:—*Held*, that the surviving trustees of 1848 were not liable to make good the funds which had been lost; that *R. L.* was not entitled to priority over the trustees of the deed of 1843; and that the persons claiming under the deed of 1843 were entitled to the funds which remained in part satisfaction of the moneys due to them.—Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a distringas on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into Court. —*Semble:* New trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance; and it has never been the practice of the Court on appointing new trustees of funds to make such an inquiry. Phipps *v.* Lovegrove. Prosser *v.* Phipps - - - - 80

LIABILITY OF TRUSTEES—*continued.*

LIFE INSURANCE—Transfer to another office
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LIQUIDATION BY ARRANGEMENT—Distress by landlord - - - - 97
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—— Petition for—Subsequent adjudication 625
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—— Registration of resolution—Stamp duty
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—— Statement of debts and assets - 218
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LIQUIDATOR—Powers of—Effect of compulsory winding-up - - - - 363
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LIS PENDENS—Receiver *pendente lite* - 34
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LUNACY—Person of unsound mind, not so found —Substituted service - - 576
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MAINTENANCE OF INFANTS—Income of legacy payable at twenty-one - - 501
See Gift on attaining Twenty-one.
—— Right to unapplied income - - 221
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MANAGING BODY—Public company—Interference of the Court - - - 298
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MARKET GARDEN—House or other building—Lands Clauses Act, s. 92 - - 458
See Part of House.

MARRIAGE WITH DECEASED WIFE'S SISTER —Setting aside settlement - 275
See Illegal Consideration.

MARRIAGE SETTLEMENT—Covenant to settle after-acquired property - - 496
See Covenant to settle.

MARSHALLING—*Charitable Legacy—Pure and Impure Personalty—Direction to marshall.*] A testator, after bequeathing an annuity and certain legacies devised his real estate to trustees upon trust for sale, and directed the proceeds to be applied, so far as they would extend, in payment of his debts and funeral and testamentary expenses and the annuity and legacies. He then gave his personal estate to the same trustees upon trust to convert the same into money, and out of the proceeds pay so much of his debts and legacies as the proceeds of his real estate would not extend to pay, and to stand possessed of all the residue of his personal estate upon trust for certain charities; and he declared that only such part or parts of his estate and premises should be comprised in the residue thereof, and be divided, paid, or transferred to or among the charities, as might by law be given or bequeathed for charitable

MARSHALLING—*continued.*
purposes. The testator was at the time of his death entitled to real estate and to pure and impure personal estate:—*Held*, that the proceeds of the real estate and impure personal estate must be applied in payment of the debts and legacies before the pure personalty was resorted to.—*Miles* v. *Harrison* (*Wickens*, V.-C., June 7, 1873) and *Sturge* v. *Dimsdale* (6 Beav. 462) observed upon. Wills *v.* Bourne - - - 487

MEASURE OF DAMAGES—*Breach of Contract—Goods to be delivered by Instalments—Non-delivery—Forbearance of Buyer—Bankruptcy—Proof.*] A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be twenty tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:—*Held*, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made.—*Ogle* v. *Earl Vane* (Law Rep. 2 Q. B. 275) distinguished. *Ex parte* Llansamlet Tin Plate Company. *In re* Voss - - - - - - - 155

MINE—Free miners—Forest of Dean—Grant of gales - - - - - 294
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MINERALS—Reservation of - - - 237
See Confirmation of Sales Act.

MISCONDUCT OF ARBITRATOR—*Award—Irregularity—Waiver—Arbitrators and one Party Lunching together—Costs.*] Certain matters in dispute were referred to three arbitrators, one to be chosen by each of the parties, and one by the two so chosen. On several occasions during the arbitration one of the parties provided luncheon at his expense, of which the arbitrator appointed by him and the third arbitrator, as well as his solicitor and one or two other persons, partook in the absence of the other party (who would not sit at the same table with his adversary) and of his arbitrator:—*Held*, that, inasmuch as it was not shewn that the parties were influenced by corrupt motives, or were affected by the luncheons, the award could not be set aside on the ground of the luncheons.—Irregularities in the mode of conducting an arbitration may be waived by continuing the arbitration after they have been discovered.—A reference was made to three arbitrators, one to be appointed by each of the parties, and one by the arbitrators so chosen. The parties selected their arbitrators, and they selected another whom they erroneously appointed as umpire, and the sittings were commenced without him:—*Held*, that the irregularity was waived by commencing the proceedings *de novo* after the mistake was discovered, and by an agreement signed by the parties by which they agreed not to impugn the award on any ground. Moseley *v.* Simpson - 226

MISCONDUCT OF PARTNER—Return of premium - - - - - 606
See Dissolution of Partnership.

MISDESCRIPTION—Legatee - - 19
See Mistake in Will. 1.
—— Locality of land in devise - - 168
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MISTAKE—Codicil—Inaccurate recital of will 19
See Revocation of Will.
—— Settled Estates Act—Misdescription of settlor - - - - 315
See Settled Estates Act. 2.
—— Will - - - - 19, 168
See Mistake in Will. 1, 2.

MISTAKE IN WILL—*Falsa Demonstratio.*] A testator by his will gave legacies of £25 each to the Rev. *J. B.*, the Rev. *N. L.*, and the Rev. *J. D. C. W.*, described as curates of a particular church. At the date of the will and the death of the testator, the Rev. *J. B.*, the Rev. *N. L.*, and the Rev. *W. C. B.* were curates of the church: there never had been any curate of that church named *W.*, but there was a clergyman of that name whose initials were *J. D. C.*:—*Held*, that the Rev. *J. D. C. W.* was entitled to the legacy, and that extrinsic evidence of the testator's intention was inadmissible. Farrer *v.* St. Catharine's College, Cambridge - - - - 19

2. —— *Devise—Falsa Demonstratio—Misdescription as to Locality and Occupation.*] Testatrix devised "all that my share and interest in the lands known by the name of *D.*, situate in the parish of *K.*, now in the occupation of *E.*"—The lands known as *D.* included two small closes in the parish of *L.*, but only accessible from the rest of the lands, which were in the parish of *K.*; also one close formerly in the same occupation as the other land, but at the date of the will and the death of the testatrix occupied by *M.* There was no residuary devise:—*Held*, that these three closes passed under the devise. Hardwick *v.* Hardwick - - - - - 168

"**MONEY**"—*Will—Words, "Any money of which I may die possessed"—Money at Bankers—Apportioned part of Annuity or Interest—Unpaid Legacy.*] A testamentary gift by a testatrix of "any money of which I may die possessed":—*Held*, to include cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal. Byrom *v.* Brandreth [475

MORTGAGE—Agreement for—Specific performance - - - - - 18
See Agreement for Mortgage.
—— Company—Book debts - - - 383
See Borrowing Powers.
—— Equitable—Deposit of deeds—Form of decree - - - - 153, 153, n.
See Deposit of Deeds. 1, 2.

MORTGAGE—*continued.*
—— Registration—Priority - - - 41
See Unregistered Mortgage.
—— Reinvestment of purchase-money—Lands Clauses Act - - - - 468
See Reinvestment of Purchase-money. 1.
MORTMAIN—Direction to marshall - 487
See Marshalling.

NEGATIVE CLAUSE—Theatrical engagement
See Theatrical Engagement. [189
NEW TRUSTEES—Liability of - - 80
See Liability of Trustees.
NEXT OF KIN—Assignee of—Administration suit - - - - - - 37
See County Court Jurisdiction.
NON-DELIVERY OF GOODS—Forbearance of buyer - - - - 155
See Measure of Damages.
NOTICE—Act of bankruptcy - - - 625
See Protected Dealing with Bankrupt.

NOTICE TO TREAT—*Railway Company—Cul-de-Sac—Public Street—Compensation.*] A railway company authorized to construct a line of railway under a public street is not bound to give notice to treat or pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street.—A *cul-de-sac* dedicated to the public is for this purpose in the same position as a public street.—The Plaintiff was the owner of a piece of ground with two rows of houses, which had existed more than twenty years, with a passage between them ending in a *cul-de-sac*, the whole of the soil of which was conveyed to him. A railway company, under the powers of their Act, gave notice to treat for some of the houses on each side, but the soil of the passage between the houses was expressly excluded from the notice. The railway was to be carried in a tunnel under the property. Evidence tending to shew dedication being given:—Injunction to restrain the company from entering on the *cul-de-sac* without giving notice to treat dissolved. Souch *v.* East London Railway Company 108

NOVATION OF CONTRACT—*Company—Transfer of Business.*] In October, 1868, an agreement was entered into between two insurance companies (*A.* and *B.*), by which *Company A.* sold its business to *Company B.*, which was to undertake the liabilities and risks upon existing policies, and, if required, issue new policies in exchange. *Company A.* was to be wound up voluntarily under liquidators nominated by *Company B.*, and all its assets and property were to be collected by *B.* and distributed amongst *A.'s* creditors, with full power for *B.* to act on and use the name of *A.*—On the 27th of November, 1868, an order was made on the petition of a creditor for compulsorily winding-up *A.*—*X.*, the transferee of a policy on the life of *Z.* granted by *A.*, paid the annual premium to *A.* in October, 1868, by whom it was received as agents for *B.* (pursuant to resolution), and in December, 1868, sent the policy to *B.* for indorsement.—*Z.* died in January, 1869, and in March the policy was indorsed with a memorandum, duly signed and sealed, that the property of *Company*

NOVATION OF CONTRACT—*continued.*
B. should alone be liable for payment of the sum assured, and with a further memorandum that the claim of *X.* on the policy was admitted payable by instalments on specified days with interest.—These instalments were paid in part, but an order having been made in November, 1869, to wind up *B.* compulsorily:—*Held*, that there was good consideration for the memorandum; that there was complete novation; and that *X.* was entitled to prove against *Company B.* for the balance due upon the policy. *In re* United Ports and General Insurance Company 854

ONUS PROBANDI—Grant of annuity by executor to legatee - - - - 577
See Costs in Administration Suit.

PARLIAMENTARY POWERS—Negligent exercise of—Injunction - - 636
See Compulsory Powers.
PARSONAGE HOUSE—Improvements in—Purchase-money under Lands Clauses Act [574
See Reinvestment of Purchase-money. 2.
PART OF HOUSE—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 92, 93—*House or other Building—Market Garden.*] A piece of land, 2A. 2R. 20P. in extent, situate in the neighbourhood of but not within the city of *Bath*, was surrounded by a ring fence, and had for many years been used as a market-garden. About twenty-five years ago a cottage, consisting of three rooms nine feet in height, with two cellars suitable for storing fruit and vegetables, was erected near a road forming part of the boundary of the land for the purpose of being occupied by the tenant of the garden. A railway company drove through this piece of land a tunnel which passed under one corner of the cottage, and divided the land into two portions, one of which was less than half an acre:—*Held*, that the company were not bound to take the whole piece of land, but only the part lying above the tunnel, the cottage, and the piece of land lying between the cottage and the road; and also, if the owner required it, the severed portion, which was less than half an acre. Falkner *v.* Somerset and Dorset Railway Company - - 458
PARTICEPS CRIMINIS—Setting aside settlement
See Illegal Consideration. [275
PARTIES—Discovery—Solicitor - - 49
See Undue Influence.
—— Suit against executor *de son tort*—Legal personal representative - - 534
See Executor de son Tort.

PARTITION SUIT—*Sale—Partition Act*, 1868 (31 *& 32 Vict. c.* 40), *s.* 4.] The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under sect. 4 of the *Partition Act*, 1868. Wilkinson *v.* Joberns - - - 14

2. —— *Sale—Partition Act*, 1868 (31 *& 32 Vict. c.* 40), *s.* 10—*Costs.*] Since the passing of the *Partition Act*, 1868, the Court is no longer

PARTITION SUIT—*continued.*
bound by the old rule as to the costs of partition suits.—In a suit for sale under the *Partition Act*, 1868, the Plaintiffs were owners of one moiety, and the Defendants of one fourth of the estate; and the owners of the remaining fourth were served with the decree:—*Held*, that the costs of all parties ought to be paid out of the estate. Simpson *v.* Ritchie - - - - 103

PARTNERSHIP—Articles—Arbitration clause—Notice of dissolution - - 564
See Submission to Arbitration.

—— Dissolution—Return of premium - 606
See Dissolution of Partnership.

—— Separate liquidation — Discharge — Joint debts - - - - 614
See Discharge in Bankruptcy.

PATENT SUIT—*Practice—Issues—Mode of Trial—Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Sir John Rolt's Act* (25 & 26 *Vict. c.* 42).] In the absence of special circumstances the ordinary issues in a patent suit will be tried before the Court itself without a jury. Patent Marine Inventions Company *v.* Chadburn - - - 447

PAYMENT OUT OF COURT—*Practice—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 69—*Fund in Court—Payment out to Tenant in Tail—Disentailing Deed.*] A fund in Court representing land taken by a railway company under their compulsory powers will not be paid out to a tenant in tail without a disentailing deed having been executed.—*Re South Eastern Railway Company* (30 Beav. 215) and *Notley* v. *Palmer* (Law Rep. 1 Eq. 241) held not applicable. *In re* Butler's Will - - - - 479

PERPETUITY—Gift to descendants as they may need - - — - 581
See Gift to Descendants as they may need.

PERSON OF UNSOUND MIND—Substituted service - - - - 576
See Substituted Service.

PERSONALTY—Power to invest in land—Repairs - - - - 493
See Investment by Trustees.

PETITION—Lands Clauses Act—Death of petitioner - - - - 107
See Revivor and Supplement.

PLEA COUPLED WITH ANSWER—*Practice—Plea overruled—Leave to answer—Second Plea with Answer.*] Where a plea has been overruled, with leave to put in an answer, the Defendant cannot file a second plea coupled with an answer without special leave of the Court. McKewan *v.* Sanderson - - - - 316

PLEADING—Plea overruled—Second plea with answer - - - - 316
See Plea coupled with Answer.

POLICY OF INSURANCE—Transfer to another office - - - - 354
See Novation of Contract.

POOR PRISONERS—Charity for relief of 129, [140, n.
See Cy-près. 1, 2.

PORTIONS—Double—Advancement - 258
See Advancement.

POWER—Appointment of new trustees - 80
See Liability of Trustees.

—— Appointment — Excessive appointment — Remoteness—Confirmation - 1
See Excessive Appointment.

—— Appointment—General and specific - 1
See Excessive Appointment.

—— Appointment—Reference to former trust 258
See Referential Trusts.

—— Appointment—Unaffected by forfeiture on insolvency - - - - 585
See Forfeiture Clause.

—— Building leases—Settled Estates Act—Trustees for sale—Consent of *cestuis que trust* - - - - 631, n.
See Settled Estates Act. 5.

—— Investment in purchase of land - 493
See Investment by Trustees.

—— Limited—Appointment without reference to [442
See Appointment without Reference to Power.

—— Sale—Mortgage - - - 18
See Agreement for Mortgage.

—— Sale and exchange—Reservation of minerals - - - - 237
See Confirmation of Sales Act.

—— To borrow money—Company - - 383
See Borrowing Powers.

PRACTICE—Affidavit of no settlement - 127
See Affidavit of no Settlement.

—— Affidavit verifying accounts - - 102
See Affidavit with Accounts.

—— Committal under Debtors Act, 1869 - 324
See Committal under Debtors Act, 1869.

—— Confirmation of Sales Act - - 237
See Confirmation of Sales Act.

—— Inquiry in Chambers—Privilege of witness [76
See Privilege of Witness.

—— Injunction before bill filed - 125, 126
See Injunction before Bill filed. 1, 2.

—— Partition suit - - - 14, 103
See Partition Suit. 1, 2.

—— Petition under Lands Clauses Act—Death of petitioner - - - - 107
See Revivor and Supplement.

—— Plea overruled—Second plea with answer [316
See Plea coupled with Answer.

—— Production of documents - 112, 179, 552
See Production of Documents. 1—3.

—— Receiver - - - - - 34
See Receiver.

—— Revivor - - - - - 107
See Revivor and Supplement.

—— Settled Estates Act - 124, 315, 532, 629, [631, n.
See Settled Estates Act. 1—5.

—— Substituted service - - - 576
See Substituted Service.

PREMIUM—Return of—Dissolution of partnership - - - - - 606
See Dissolution of Partnership.

PRIORITY—Registered and unregistered mortgage - - - - - 41
See Unregistered Mortgage.

PRIVILEGE OF WITNESS—*Practice—Evidence.*] In the prosecution before the Chief Clerk of an inquiry directed by an administration decree, any person able to give information relating to the assets may be summoned by subpœna, and is bound to attend before a Special Examiner, and to answer all questions properly put to him by the receiver having the conduct of the decree; but the witness so summoned may decline to answer any questions tending to shew his liability in a pending action commenced by the receiver against him. Venables *v.* Schweitzer - - 76

PRIVILEGED COMMUNICATION—Solicitor and client - - - - 112
See Production of Documents. 1.

PROBATE—Receiver pending grant - 34
See Receiver.

PROBATE DUTY—Residue—Specific legacies 308
See Legacy, Specific or General.

PRODUCTION OF DOCUMENTS—*Correspondence between co-Defendants — Solicitor and Client.*] The correspondence between co-Defendants after the institution of a suit is not, as a general rule, privileged from production; but where one Defendant, being a solicitor, has acted as agent for the solicitor on the record, to collect evidence in the suit, the letters passing between him and his co-Defendant are privileged communications. Hamilton *v.* Nott - - - - 112

2. —— *Affidavit—Bill by a Republic—Proper Officer of the Government.*] Where a bill was filed by a republican government it was held that a Defendant having put in a sufficient answer was entitled to the usual affidavit of documents to be made by one or more of the ministers or officers of the Plaintiff government. Republic of Liberia *v.* Imperial Bank - - - - 179

3. —— *Practice — Affidavit of Documents — 15 & 16 Vict. c. 86, s. 18—Discretionary Power in the Court.*] In a suit by an alleged next of kin to an intestate, against the Solicitor to the Treasury, to whom administration had been granted:—*Held*, that the Defendant was not bound to make an affidavit of documents until a *primâ facie* case had been made by the Plaintiff. The order for production of documents is discretionary. Lane *v.* Gray - - - 552

PROTECTED DEALING WITH BANKRUPT—*Liquidation Petition—Resolution to accept Composition—Subsequent Adjudication—Act of Bankruptcy—Notice—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 95, 126—*Bankruptcy Rules*, 1870, *rr.* 266, 267.] On the 12th of November a debtor filed a liquidation petition. The creditors resolved to accept a composition. The debtor failed to pay it when due, and on the 28th of May he was adjudicated a bankrupt upon a petition filed on the 29th of April, the act of bankruptcy being the filing of the liquidation petition. On the 29th of March he had executed a mortgage of some leasehold property, in substitution for a mortgage, given to the same creditor two years before the liquidation petition was filed, of a lease which afterwards turned out to be void:—*Held* (reversing the decision of the County Court Judge), that though, when the mortgage of the 29th of March was executed, the mortgagee had notice of the filing of the liquidation petition, yet

PROTECTED DEALING WITH BANKRUPT—*continued.*
it was not notice of an act of bankruptcy then available for adjudication against the debtor, and consequently that the mortgage was protected by sect. 95 of the *Bankruptcy Act*, 1869. *Ex parte* Hoare. *In re* Walton - - - 625

PUBLIC OFFICER — Republican government — Affidavit of documents - - 179
See Production of Documents. 2.

PUBLIC STREET—*Cul-de-sac*—Dedication to the public - - - - 108
See Notice to treat.

PURCHASE-MONEY—Lands Clauses Act—Payment out of Court - - - 479
See Payment out of Court.

—— Lands Clauses Act — Reinvestment 468, [574
See Reinvestment of Purchase-money. 1, 2.

PURCHASER IN GOOD FAITH — Bankruptcy Act, 1869, s. 92 - - - 397
See Fraudulent Preference.

RAILWAY COMPANY — Compulsory powers — Negligent exercise of - - 636
See Compulsory Powers.

—— Lands Clauses Act — Reinvestment of purchase-money - - 468, 574
See Reinvestment of Purchase-money. 1, 2.

—— Notice to treat - - - - 108
See Notice to treat.

RECEIVER—*Practice—Receiver pendente lite—Probate Court—Caveat.*] The Court may appoint a receiver of personal estate pending the grant of probate which has been delayed on account of a caveat having been entered where a suit in the Probate Court has not been actually constituted. —The Court will, also, under the same circumstances, appoint a receiver *pendente lite* of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession. Parkin *v.* Seddons - - - - - 34

RECITAL—Codicil—Inaccurate recital of will 19
See Revocation of Will.

RECTIFICATION OF REGISTER - - 559
See Transfer of Shares.

REFERENTIAL TRUSTS — *Will — Construction.*] A testator by his will made a series of specific devises, upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; and he then gave his residuary real and personal estate upon and for the trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised:—*Held*, that each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically devised estate and the child's share of residue.—*Secus*, if the power had been to appoint an annuity of or not exceeding a fixed amount, Cooper *v.* Macdonald - 258

REGISTRATION—Bill of sale - - 414
See Registration of Bill of Sale.
—— Designs—Copyright - - - 117
See Copyright of Design.
—— Resolution for liquidation—Stamp duty
See Stamps. 1, 2. 215, 623
—— Transfer of shares—Refusal of directors to register - - - - 559
See Transfer of Shares.
—— Yorkshire Registry Act - - 41
See Unregistered Mortgage.

REGISTRATION OF BILL OF SALE—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Equitable Assignment—Letter of Hypothecation—Agreement to execute Bill of Sale.*] Traders, in consideration of goods being supplied to them by brokers on credit, signed a written document addressed to the brokers, by which they undertook and agreed "to hold at your disposal all our stock of soap and raw materials, and from time to time, whenever required by you so to do, to execute a valid and effectual transfer and assurance of the same to you . . . to the intent that out of the premises all claims and demands for the time being owing from us to you may be fully paid and satisfied." The security was to be a continuing one. This document was never registered under the *Bills of Sale Act*, nor was any bill of sale ever executed. Some time afterwards the traders filed a liquidation petition. A few days before the petition was filed the brokers demanded possession of the soap and raw materials then on the trader's premises, but did not succeed in obtaining it:—*Held*, that the document, not having been registered under the *Bills of Sale Act*, was void against the trustee under the liquidation. *Ex parte Mackay* (Law Rep. 8 Ch. 643) followed. *Ex parte* Conning. *In re* Steele - - - 414

REINVESTMENT OF PURCHASE-MONEY — *Lands Clauses Act*, *s.* 80 — *Purchase-Money in Court—Reinvestment on Mortgage—Costs.*] Where purchase-money had been paid into Court under the *Lands Clauses Act* and invested in Consols, upon an application for its reinvestment on mortgage security:—*Held*, that such reinvestment could not be treated as a permanent investment under sect. 80 of the Act; and that the company must pay the costs without any condition as to the costs of any future permanent investment. *In re* Blyth's Trusts - - - - 468

2. —— *Railway Company — Glebe—Improvements and Additions to Parsonage House—Lands Clauses Act*, 1845, *s.* 69.] The purchase-money for glebe lands taken by a railway company may, with the consent of the bishop and patron, be applied towards the expenses of improvements of and additions to the rectory house.—Form of Order. *Ex parte* Rector of Claypole - 574

REMOTENESS—Appointment - - 1
See Excessive Appointment.
—— Charity - - - - - 581
See Gift to Descendants as they may need.

RENEWABLE LEASEHOLDS — *Ecclesiastical Leaseholds — Ecclesiastical Commissioners — Purchase of Reversion—Surrender of Lease as to part —23 & 24 Vict. c.* 124, *ss.* 20, 35, 37, 39.] A testator bequeathed specifically leaseholds held under a dean and chapter to trustees upon trust for a tenant for life, with remainders over. The will contained directions amounting to a trust for renewal overriding the interest of the tenant for life, and also an absolute power of sale in the trustees. The reversion became vested in the Ecclesiastical Commissioners, who refused to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest and payment of a sum of money. The tenant for life opposed the acceptance of such proposal, on the ground that her income would be greatly diminished:—*Held*, that the proposed arrangement was within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the Court had power to direct it to be carried into effect; and an inquiry was directed whether the proposed arrangement was proper and beneficial, having regard to the value of the leasehold property and the right of the remaindermen under the will to succeed, upon the death of the tenant for life, to the enjoyment as nearly as might be of the corpus of the same property to the income of which the tenant for life was entitled during his life. Hollier *v.* Burne [163

RENT—Award under arbitration—Specialty or simple contract debt - - 26
See Specialty Debt.
—— Distress after commencement of bankruptcy
See Distress after Bankruptcy. [97
REPAIRS—Investment in - - - 493
See Investment by Trustees.
REPAYMENT—Allottees of shares—Void amalgamation - - - - 417
See Amalgamation of Companies. 2.
REPUBLIC—Bill in Chancery by—Affidavit of documents - - - - 179
See Production of Documents. 2.
RESERVATION OF MINERALS—Confirmation of Sales Act—General direction - 237
See Confirmation of Sales Act.

RESIDUARY GIFT — *Legacy—Charge on Real Estate—Specific Devise.*] A testator, after giving certain pecuniary legacies, devised as follows: "As to all my messuages, farms, and lands at *Naunton*, consisting of about 180 acres, my stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of my estate and effects, real and personal, I bequeath and devise the same unto my said wife to hold unto my said wife until my youngest child shall attain twenty-one years," with limitations over in favour of the children:—*Held*, that the pecuniary legacies were not charged on the farm at *Naunton*, or on the residuary real estate. Castle *v.* Gillett - - - - - - 530

RESTRAINING GROUNDLESS ACTION—*Injunction—Contract for Work—Architect's Certificate —Jurisdiction—Similar Defence at Law and in Equity.*] The Defendants contracted to do certain work for the Plaintiff, which was to be subject to the approval of an architect, and no payment was to be made without his certificate. The Defendants demanded a larger sum than was certified by the architect, and brought an action for the amount. The Plaintiff filed his bill for an in-

RESTRAINING GROUNDLESS ACTION—*contd.*
junction to restrain the action:—*Held*, that the Plaintiff could as well plead at law as in this Court that the architect's certificate was conclusive under the contract; and there was no equity to justify the bill.—Motion for an injunction refused. Baron De Worms *v.* Mellier 554

RESTRAINT ON ANTICIPATION — *Married Woman—Separate Estate—Fraud.*] There is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint on anticipation appears from the instrument in respect of which relief is sought.—A married woman who had previously to her marriage settled certain property upon trust for herself during the joint lives of herself and her husband for her separate use, without power of anticipation, and after the death of one of them for the survivor for life, and after trusts for the benefit of the children of the marriage, upon such trusts as she should by deed or will appoint, and (there being no children of the marriage) had by deed irrevocably appointed her reversionary interest in favour of her mother, subsequently, and, as she alleged, under the compulsion of her husband, made another absolute irrevocable appointment of her reversionary interest in favour of her husband without noticing the previous appointment. The husband deposited the appointment in his favour to secure a debt to himself:—*Held*, on bill filed by the assignee of the debt and security, that, assuming the second appointment to be fraud on the part of the wife, inasmuch as it was not based upon any active misrepresentation by her, but disclosed the restraint on anticipation, and only attempted to deal with the reversionary interest, the assignee of the security was not entitled to impound the income during her life to make good his loss by such fraud. Arnold *v.* Woodhams - 29

RETAINER BY EXECUTOR—*Legacy to Married Woman — Reversionary Interest — Assignment — Husband's Debt*—20 & 21 *Vict. c.* 57.] A married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to *L.* for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57. On the reversion falling in, the executors of the testator claimed to be entitled to retain the amount of the debt out of the legacy:—*Held*, that there was no right of retainer, and that *L.* must be paid in full. *In re* Batchelor. Sloper *v.* Oliver - - 481

REVERSION—Renewable leaseholds—Purchase of reversion - - - - 163
See Renewable Leaseholds.

—— Wife's reversionary interest — Executor's right of retainer - - - 481
See Retainer by Executor.

REVIVOR AND SUPPLEMENT—*Practice—Petition—Death of Sole Petitioner—Lands Clauses Act—Payment of Costs to Executors.*] A Petition for investment in real estate of a fund paid into Court under the *Lands Clauses Act*, presented by a person who had died after order obtained on the Petition, but before it had been worked out in Chambers, ordered to be revived on the application of the executors of the Petitioner, and the costs ordered to be paid to the executors. *In re* Youl - - - - - - 107

REVOCATION OF WILL — *Codicil — Revocation — Inaccurate Recital of Will—Gift of Legacy "in addition" to Legacy inaccurately stated to be given.*] A codicil revoking a will does not necessarily revoke a prior codicil.—A testator made a will and two codicils, by none of which he gave anything to *St. Catharine's College*, and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his said will he had bequeathed £1000 to *St. Catharine's College*, he confirmed the said bequest, but in all other respects he revoked his said will: and he gave to *St. Catharine's College* (in addition to the bequest of £1000) a sum of £5000, and appointed executors of his said will and codicil:—*Held*, that the last codicil revoked the will of the testator, but not the codicils of prior date:—*Held*, also, that under the last codicil *St. Catharine's College* was entitled to a legacy of £6000 in the whole. Farrer *v.* St. Catharine's College, Cambridge 19

RUNNING POWERS—Traffic arrangement 433
See Traffic Arrangement.

SALE—Equitable mortgagee by deposit of deeds, not entitled to sale - 153, 153, n.
See Deposit of Deeds. 1, 2.

—— Goods by instalments—Non-delivery 155
See Measure of Damages.

—— Partition suit - - - 14, 103
See Partition Suit. 1, 2.

—— Settled Estates Act 124, 315, 532, 629, 631, n.
See Settled Estates Act. 1—5.

SCHOOL—Industrial—Children of convicts 129
See Cy-près. 1.

SEPARATE ESTATE—Restraint on anticipation
See Restraint on Anticipation. [29

SERVICE—Substituted - - - 576
See Substituted Service.

SETTING ASIDE SETTLEMENT — Illegal consideration - - - - 275
See Illegal Consideration.

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120)—*Copyholds—Sale as Freehold—Costs of Enfranchisement.*] In an application for a sale of real estate under the *Settled Estates Act*, where the property proposed to be sold comprises copyholds as well as freeholds, the Court may direct that the copyholds be enfranchised before the sale, and the costs of enfranchisement paid out of the proceeds of the sale. *In re* Adair's Settled Estates - - - - - - 124

2. —— *Practice—Petition—Misdescription—Error in describing the Settlor.*] In the advertisements issued in pursuance of sect. 20 of the *Leases and Sales of Settled Estates Act*, a settlor was described as of "*Gotham*, in the county of *Middlesex*," instead of the county of *Nottingham*. The Court considered that, as all parties interested under the settlement were represented on the

SETTLED ESTATES ACT—*continued.*

application, the advertisements might be considered sufficient. *In re* Hemsley's Settled Estates - - - - - - 315

3. —— *Interim Investment—Cash under the Control of the Court.*] The purchase-money of land sold under the *Settled Estates Act* is cash under the control of the Court, and may be invested as such.—*In re Boyd's Settled Estate* (L. C. for M. R., June 2, 1873) not followed. *In re* Taddy's Settled Estates - - - 532

4. —— *Consent to Application for Sale—Unascertained Contingent Remaindermen — Trustee for Sale.*] A testator devised a freehold estate upon trust for his daughter for life, remainder to her husband for life, and after the death of the survivor upon trust to sell and stand possessed of the proceeds for all the children of his daughter who should be living at the death of the survivor of the daughter and her husband, and who should attain twenty-one, and also the issue then living, and who should attain twenty-one, of any child or children of the testator's daughter who should have previously died.—The testator's daughter had six children living, all over twenty-one, and one of them had two infant children:—*Held*, that an order for sale under the *Settled Estates Act*, made with the concurrence of the testator's daughter and her husband, and the trustee for sale, and five of the children, was not invalid by reason of the non-concurrence of the infant children:—*Held*, also, that the trustee being before the Court, it was unnecessary to have the concurrence of any of the *cestuis que trust*. *In re* Strutt's Trusts - - - - - - 629

5. —— *Consent to Application for Sale—Trustees for Sale.*] A testator devised his real estate to trustees upon trust for his wife for life, and after his death upon trust to sell and hold the proceeds upon the trusts therein mentioned, with the usual power to give receipts. During the life of the tenant for life the trustees presented a petition for an order for a power to grant building leases under the *Settled Estates Act*:—*Held*, that the consent of the persons lawfully interested in the proceeds of the sale was not necessary. *In re* Potts' Estate - - - 631, n.

SETTLEMENT—Covenant to settle after-acquired property - - - - 496
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SOLICITOR'S LIEN—*Solicitor and Client—Costs—Charge upon "Property recovered or preserved"—23 & 24 Vict. c.* 127, *s.* 28.] In a suit by a residuary legatee against the sole surviving trustee of a testator's estate an administration decree was made, and it was ordered that a new trustee be appointed. The decree was carried into Chambers and the accounts brought in, when the Plaintiff stopped all further proceedings in the suit. On a petition by the solicitor who had acted for the Plaintiff in the suit, praying that his costs might be charged on the Plaintiff's interest in the estate, under 23 & 24 Vict. c. 127, s. 28:—*Held*, that there had been no "property recovered or preserved" within the meaning of the Act, and that the solicitor was not entitled to any charge. Pinkerton *v.* Easton - - - 490

SPECIALTY DEBT—*Rent—Award under Arbitration—Specialty not Simple Contract Debt.*] In 1862 *A.* agreed to lease a mine to *B.* Disputes arose between the parties, and *A.* brought an action against *B.* under the agreement, and *B.* filed a bill against *A.* to have the agreement set aside. The parties then referred all the matters in dispute between them to arbitration, and the arbitrator awarded that the agreement for a lease was valid; that it should be cancelled, and that *B.* should pay to *A.* the sum of £5513. *B.* died, and a suit was instituted to administer his estate, under which *A.* carried in a claim to rank as a specialty creditor in respect of the sum awarded:—*Held*, that the sum was awarded by way of damages and not for rent, and therefore was not entitled to rank as a specialty debt. Talbot *v.* Earl of Shrewsbury - - - 26

SPECIFIC DEVISE—Charge of legacies—Blended fund - - - - - 530
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SPECIFIC LEGACY—Abatement - - 19
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—— Apportionment of income - - 528
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—— Proportionate part of sum of stock - 308
See Legacy, Specific or General.

SPECIFIC PERFORMANCE — Mortgage with power of sale - - - 18
See Agreement for Mortgage.

STAMPS—*Liquidation—Special Resolution—Registration—Surplus of Assets over Debts—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 55, 125, *sub-s.* 4—*Bankruptcy Rules*, 1870, *r.* 274—*Order Regulating Fees of* 10*th August*, 1871, *Table A.*] Where the assets of a liquidating debtor exceed his debts stamp duty upon the registration of the

STAMPS—*continued.*
special resolution of the creditors is not payable on any amount exceeding the sum estimated as necessary to pay all the creditors in full. *Ex parte* Murray. *In re* Forrest - - - 215

2. —— *Liquidation—Registration of Resolution—Difference between Estimates made by the Debtor and by the Trustee of the value of the Assets—Order Regulating Fees of 10th August*, 1871, *Table A.*] A debtor filed a liquidation petition, and in his statement he estimated his assets at £4660. The creditors resolved on a liquidation. When the trustee presented the resolution for registration he had made an affidavit in which he stated that he believed the assets would not realize more than £1000, and he had only paid stamp duty on £1000. It did not appear that the value of the assets, as estimated by the debtor, would be more than enough to pay the creditors in full:—*Held*, that stamp duty must be paid on the amount of the debtor's estimate.—*Ex parte Murray* (Law Rep. 16 Eq. 215) explained. *In re* Berger 623

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17 & 18 Vict. c. 36, ss. 1, 7—*Bills of Sale* 414
See Registration of Bill of Sale.

17 & 18 Vict. c. 87—*Burials* - - 288
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17 & 18 Vict. c. 125, s. 11—*Common Law Procedure* - - - - - 564
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—— —— ss. 61, 62 - - - 619
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18 & 19 Vict. c. 128—*Burials* - - 288
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19 & 20 Vict. c. 120—*Settled Estates* 124, 315, [532, 629, 631, n.
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20 & 21 Vict. c. 57—*Reversionary Interests* 481
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22 & 23 Vict. c. 59—*Railway Companies Arbitration Act* - - - - - 433
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23 & 24 Vict. c. 127, s. 28—*Solicitors* - 490
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SUBMISSION TO ARBITRATION—*Partnership—Arbitration Clause—Common Law Procedure Act*, 1854, *s.* 11.] In 1868 *C.* was admitted by purchase into partnership with *A.* and *B.*, a firm of solicitors, for a term of fifteen years. It was provided by the Articles that if at any time any dispute or difference of opinion should arise between the partners relative to any clause, matter, or thing therein contained, or to the conduct of any of the partners, or upon any other point whatever, the same should be referred to arbitration.—On the 17th of June, 1873, *A.* and *B.* served *C.* with notice, alleging that he had committed divers breaches of the articles, and in particular had neglected to keep proper accounts and to make proper entries of business, and declaring the partnership dissolved and determined from the date of serving the notice, under a power contained in the Articles.—*C.* refused to admit the validity of this notice of dissolution, and told his partners that he should submit the question of the validity of the notice to arbitration. On the 1st of July *A.* and *B.* filed their bill for a partnership account on the footing of a dissolution from the time of serving the notice, and on the same day *C.* served them with notice requiring them to refer to arbitration all questions that had arisen relative to the notice of dissolution:—*Held*, on motion by *C.*, that he was entitled to an order staying proceedings in the suit, pursuant to the *Common Law Procedure Act*, 1854, in order that the questions as to the validity of the notice of dissolution might be determined by arbitration. Plews *v.* Baker - - - 564

SUBSTITUTED ORDER—Bankruptcy - 391
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SUBSTITUTED SERVICE—*Practice—Lunatic Defendant not so found by Inquisition.*] Substituted service of copy of bill allowed on the medical officer of the asylum in which a Defendant of unsound mind, but not so found by inquisition, had been placed, on an affidavit that the medical officer refused to allow any person to see the Defendant or to serve him with legal papers. Raine *v.* Wilson - - - - - 576

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TAXATION OF COSTS—*Practice—Costs—Payment out of Fund in Court—Disbursements by Solicitor—Interest—33 & 34 Vict. c. 28, s. 17.*] The 17th section of the Act 33 & 34 Vict. c. 28, which enables the Taxing Master upon a taxation of costs to allow interest on moneys disbursed by a solicitor for his client, is intended to apply only as between a solicitor and his own client, and does not apply to a taxation of costs to be paid as between solicitor and client out of a fund in Court belonging wholly or partly to other persons than the client. Hartland *v.* Murrell - 285

2. —— *Solicitor and Client—Expiration of Twelve Months from Delivery—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 37.] Existence of the relation of solicitor and client is not alone a "sufficient circumstance" within the statute, 6 & 7 Vict. c. 73, s. 37, to justify a reference for taxation after the expiration of twelve months from the delivery of the bill of costs.—Observations on *In re Nicholson* (3 D. F. & J. 93), *In re Flower* (18 L. T. (N.S.) 457; 16 W. R. 749), and *In re Dickson* (8 D. M. & G. 655). *In re* Elmslie & Co. *Ex parte* Tower Subway Company - - - - 326

3. —— *Solicitor and Client—Bills of Costs—Series of Bills treated as one—Taxation after Twelve Months.*] A solicitor having delivered successive bills of costs relating to the same suit and on the same retainer, and having received from his client payments on account, though not in discharge of any one bill, sent a signed letter to the client, stating that he should increase some of his former charges, and containing a list of additions to certain items in his previous bills:—*Held*, that, under the circumstances of the case, the letter, being a correction of the earlier bills, must be treated as bringing them down as one entire bill to that date, and that taxation of the whole must be directed, though most of them had been delivered more than twelve months before the application.—*Quære*, whether, as a general rule, when a succession of signed bills has been delivered to a client relating to a particular business, the relationship of solicitor and client being continued throughout, each bill is to be regarded as an addition to the others, so as to bring the whole series as one single bill down to the date of the latest delivery. *In re* Cartwright - 469

TENANT FOR LIFE—Investment in repairs and improvements - - - 493
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—— Remainderman—Adjustment of accounts
See Adjustment of Accounts. [320
—— Renewable leaseholds - - - 163
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TENANT FROM YEAR TO YEAR—*Company—Leasehold Interest—Statute of Frauds.*] *A.* agreed, in writing, to let to *B.* certain premises at a rent of £36, payable quarterly; and not to raise the rent or give *B.* notice to quit so long as he continued to pay the rent when due. *A.* (who had only a leasehold interest to expire in 1881)

TENANT FROM YEAR TO YEAR—*continued.*
had also agreed verbally with *B.* to let him remain in the premises for such term of years (not exceeding *A.'s* term therein) as *B.* might desire to continue tenant thereof. A railway company contracted to purchase the interest of *B.* in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of *A.*, which term will expire in 1881." The company disputed *B.'s* title to the interest described, and paid the purchase-money into Court:—*Held*, that the relation of landlord and tenant made *B.* a purchaser for valuable consideration to the extent of his lease; that the *Statute of Frauds* was no bar in equity to *B.'s* claim; that *B.* was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money. *In re* King's Leasehold Estates. *Ex parte* East of London Railway Company - - - - 521

TENANT IN TAIL—Payment of purchase-money out of Court - - - 479
See Payment out of Court.

TESTAMENTARY PAPERS—Invalid declaration of trust - - - - 340
See Voluntary Gift.

THEATRICAL ENGAGEMENT—*Injunction—Contract to play for "the Season"—No Negative Clause against performing elsewhere.*] An actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.—Observations on *Lumley* v. *Wagner* (1 D. M. & G. 604). Montague *v.* Flockton - - - - - 189

"THEN LIVING"—*Will—Construction—"Child then living" held to mean "Child, who or whose issue should be then living.*] A testator made a series of specific devises upon trust for each of his children for life, with remainder to the children of such tenant for life as tenants in common in tail, with cross remainders between them, and failing such issue of the tenant for life, in trust for the testator's other children equally, and the heirs of their respective bodies, as tenants in common, or if there should be only one of his said children "then living," in trust for that child, and the heirs of his or her body; he afterwards gave a share of his residuary real and personal estate upon such trusts as should correspond with those declared concerning his specifically devised estate, which gift was followed by a provision for the event of any child dying in the testator's lifetime, leaving children:—*Held*, that the gift over, on failure of the issue of a tenant for life, was in favour of children who, or whose issue, were living at the time when the gift over took effect. Cooper *v.* Macdonald 258

TRAFFIC ARRANGEMENT—*Railway Company—Working Agreement—Agreement to carry Particular Traffic over Line—Injunction—Arbitration Clause—Railway Companies Arbitration Act*, 1859 (22 & 23 *Vict. c.* 59)—*Jurisdiction.*] By an agreement dated the 26th of February, 1866, and afterwards confirmed by Act of Parliament, the Plaintiff company agreed to construct a line of railway between certain termini, and the Defendant company agreed to work it, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or failing such nomination by the Board of Trade on the application of either company in February in each year; and that all such clauses of the Acts of Parliament for the time being in force in regard to railways as should relate to the settlement of disputes by arbitration should, so far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for 999 years from the date thereof. The Plaintiff company constructed the line, and the Defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the Plaintiffs' line by other lines belonging to the Defendant company, and a bill was filed to restrain the Defendant company from so doing:—*Held*, on demurrer, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the Court was not ousted; secondly, that the case was one in which the Court could interfere by injunction:—*Lumley* v. *Wagner* (1 D. M. & G. 604) considered. Wolverhampton and Walsall Railway Company *v.* London and North-Western Railway Company - - 433

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TRANSFER OF SHARES—*Company—Shareholder—Distribution of Shares in order to secure full Voting Powers—Refusal to register Transfers—Registration ordered—Companies Act*, 1862, *s.* 35—*Companies Act*, 1862, *s.* 26.] The articles of association of a company provided that every member should have one vote for every share up to 100, one for every five shares in the next 100, and one for every ten shares after 200. The directors were empowered to decline to register any transfer of shares made by a member who was indebted to the company; or, in the case of shares not fully paid up, to a transferee of whom they did not approve.—Notices having been issued of a meeting at which would be proposed resolutions for winding up the company voluntarily, and for the appointment of a liquidator, the largest creditors of the company, who were also the holders of 1000 fully paid-up shares, in order to secure full voting powers at the meeting, made nine transfers of 100 shares each to as many nominees of their own, and sent them in for registration; but the company refused to register the transfers.—On motion on behalf of the transferors under the 35th section of the *Companies Act*, 1862;—The company were ordered to register the transfers in time to enable the transferees to vote at the meeting. *In re* Stranton Iron and Steel Company - - - - - 559

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TRUSTEE IN LIQUIDATION—*Title of Trustee—Relation back—Act of Bankruptcy before filing of Petition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 15, 125.] The title of the trustee in a liquidation by arrangement relates back to an act of bankruptcy committed by the debtor before the filing of the petition in the same way as that of a trustee in a bankruptcy.—On the 8th of February a creditor levied execution upon the goods of his debtor upon a judgment for less than £50. On the 10th of February, the sheriff not having sold, the debtor filed a liquidation petition, and a receiver was appointed. The debtor had, on the 16th of January, executed a bill of sale assigning all his property to secure a past debt:—*Held*, that the title of the trustee under the liquidation related back to the execution of the bill of sale, and that he was entitled to the goods seized by the execution creditor. *Ex parte* Eyles. *In re* Edwards - - - 99

UNAPPLIED INCOME — *Will — Construction — Period of Vesting—Deferred Payment—Gift of Income for Maintenance.*] A testator gave a sum of £5000 to trustees upon trust to invest, and to apply the income to or for the maintenance of a nephew till he should attain his age of twenty-four years, and directed that when he attained that age the principal sum should be paid to him, and he made a gift over in case of the death of the nephew under that age.—The legatee was an infant at the testator's death, and died an infant some years afterwards. The trustees raised the fund, and applied part of the income to his maintenance and education, and at his death they had in their hands an accumulation of income unapplied:—*Held*, that the legacy was vested at the testator's death, subject to be divested in the event which happened of the death of the legatee under the specified age, and that the whole of the income belonged to him during his life, and that his personal representative was entitled to the accumulations. *In re* Peek's Trusts - 221

UNDUE INFLUENCE—*Fiduciary relation between Parties—Want of due Caution—Practice—Solicitor made Party for Discovery and Costs, and ordered to pay Costs—Suit improperly Defended.*] A suit which had been instituted to set aside certain deeds and documents by which the Plaintiff had conveyed away the whole of her property, and to recover back the property lost by means of them, was defended on behalf of the party who claimed under the deeds by the solicitor who had prepared the documents sought to be impeached. The bill was then amended by making the solicitor a party for discovery, and asking that he might be ordered to pay the costs of the suit. The amended bill also contained charges of improper motives against him, which were not sustained:—*Held*, that his having defended the suit on behalf of the principal Defendant, and endeavoured to support the transactions sought to be impeached, in addition to want of caution in the preparation of the documents themselves, were sufficient reasons for ordering him to pay the costs of the suit if the estate sought to be made liable were insufficient to pay them, notwithstanding that the charges against him were not sustained.—It was an additional circumstance against him that, when he acted as solicitor in the suit, he knew that the estate sought to be made liable would probably not be able to pay the costs of the suit.—*Marshall* v. *Sladden* (7 Hare, 428) and *Harvey* v. *Mount* (8 Beav. 439) discussed. Baker *v.* Loader - - - - - 49
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UNREGISTERED MORTGAGE — *Priority of Charges—Yorkshire Registry Act* (5 *Anne, c.* 18).] *A.* executed a legal mortgage of property in *Yorkshire* to *B.* for £700; at the same time he borrowed £100 from *C.*, and signed a memorandum agreeing to give *C.* a second mortgage on the property to secure that amount. *A.* subsequently executed another mortgage of the property for £500 to *D.* The first and third mortgages were registered at *Wakefield*, but not the second:—*Held*, that the third mortgage had priority over the second. *In re* Wight's Mortgage Trust 41
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VOLUNTARY GIFT—*Gift inter vivos imperfect on ground of incomplete Delivery—Testamentary Papers anterior to Date of Will found after Death of Testatrix—Invalid Declaration of Trust.*] In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such inte-

VOLUNTARY GIFT—*continued.*

rest beyond his own reach.—An unmarried lady, possessed of large property, being under obligations to the Plaintiff, a servant, called him one day into her room and shewed him a box which, having opened it and put a note inside, she locked and handed to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to the Defendant, a stranger in blood. After her death the box was opened and found to contain a paper writing, dated and signed by the testatrix, and addressed to the Plaintiff, to the effect that the contents of the box were a deed of gift to the Plaintiff of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, *M.*, not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death there was found by the Plaintiff, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the Plaintiff, to the effect that the title deeds of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of *M.*":—*Held*, that these papers were of a testamentary character, and did not amount to a valid declaration of trust in favour of the Plaintiff.—*Richardson* v. *Richardson* (Law Rep. 3 Eq. 686) and *Morgan* v. *Malleson* (Law Rep. 10 Eq. 475) observed upon. WARRINER *v.* ROGERS 340

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